18

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 247.

SCOTT LOGAN, PLAINTIFF IN ERROR,

vs.

W. R. DAVIS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

FILED APRIL 29, 1913.

(23,188)

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1 In the Supreme Court of Iowa, January Term, A. D. 1909.
In Equity.

SCOTT LOGAN, Appellant,
vs.
W. R. DAVIS, Appellee.

Appeal from O'Brien County District Court.

David Mould, Judge.

W. P. Briggs, Attorney for Appellant.
M. B. Davis, Attorney for Appellee.

APPELLANT'S ABSTRACT OF RECORD.

Due, timely and legal service of the within Abstract of Record is hereby acknowledged this — day of ——, 1908.

——— ———,
Attorney for Appellee.

2 (For the purpose of brevity, the name "Sioux City Co." has been used, in abstracting this record for Sioux City & St. Paul Railroad Co., and the name "Milwaukee Co." for the Chicago, Milwaukee & St. Paul Railroad Co.)

On May 1st, 1901, plaintiff filed in the O'Brien District Court a

Petition

stating as cause of action as follows:

That he is the absolute owner in fee simple, and entitled to the immediate possession of Lots 3 and 4 and the Northwest quarter of the northwest quarter of Sec. 17, Twp. 97, Range 42, O'Brien County, Iowa. That defendant unlawfully keeps him out of possession thereof. That he has sustained damages by reason of defendant's wrongful possession in the sum of $500. That abstract of title relied on by plaintiff is attached as "Exhibit A."

Demands judgment for immediate possession of said land and $500 damages and costs.

(Foregoing is duly signed by plaintiff's attorney.)

EXHIBIT "A."

1. Receiver's receipt. United States to Scott Logan, dated February 28, 1901, filed for record Mar. 7, 1901, recorded Book 38, Deeds, page 166, O'Brien County records.

On July 26, 1901, defendant filed an

Answer and Counterclaim

to said petition, setting up the following grounds:

3 1. Denies every allegation in plaintiff's petition not hereafter admitted or otherwise answered.

2. Specifically denies that plaintiff is the owner of, or entitled to the possession of said property, or that defendant unlawfully keeps him out of possession thereof, or that he has sustained damages in any amount. Admits defendant now in possession.

3. Defendant, by way of equitable defense and counterclaim, alleges that he is the absolute and unqualified owner of said land, and for cause of such claim represents as follows:

That a grant of land was made to the State of Iowa by Act of Congress, approved May 12, 1864, as follows: (Here is set out entire Act of Congress, 13 Stat. 72, abstracted herein as part Par. 1, stipulation of facts.)

4. That on April 3, 1866, the State of Iowa duly accepted said grant, and on the same day conferred that portion made in aid of the construction of said road from Sioux City to the south line of Minnesota, upon the Sioux City & St. Paul Railroad Co., a corporation, said grant to said railroad company being made upon the terms, conditions, and restrictions contained in said act of Congress.

5. That the Railroad Company accepted said grant and entered upon the construction of said road and completed five sections of ten miles each of said road from the Minnesota State line southward and received from the State of Iowa the amount of land it was entitled to by reason of said construction under said grant.

6. That in his message to the Iowa Legislature in January,

4 1882, the Governor of the State of Iowa called the attention of the legislature to the failure of the said Railroad Company to complete said road in accordance with the terms of the grant and informed the Legislature of his refusal to convey any more lands to the Company because it had already received all the land it had earned, recommending action to be taken by the Legislature to secure completion of the line of road.

7. That the 19 G. A. of Iowa, in pursuance thereof, enacted the following law, declaring the forfeiture of the lands granted, and fully resuming the same.

(Here is set out entire Act of Mar. 16, 1882, 19 G. A. 107. Abstracted herein as part Par. 24 Stipulation of Facts.)

8. That on Mar. 27, 1884, the Legislature of Iowa relinquished to the United States all their right and title to said lands by the following Act. (Here is set out entire act of Mar. 27, 1884, 20 G. A. 71. Abstracted herein as part Par. 25 Stipulation of Facts.)

9. That at the time of the passage of said Act of 1882, there remained of said grant, not yet earned and not yet conveyed to the company by the state, among other lands, the northwest quarter of Sec. 17, Twp. 97, Range 42, O'Brien County, Iowa.

10. That the amount of lands granted and patented to the State

of Iowa to secure the building of a railroad from Sioux City, Iowa, to the Minnesota State line and granted conditionally to the Sioux City Co. by the State, and which was withheld from conveyance to said railroad company by the State by reason of the Company's failure to build said road any further than to Le Mars, Iowa, and by reason of the failure of the Company to comply with the provisions of the granting act of 1864, and held by the State under the original grant and never certified or patented to the Company was 85,457.40 acres, and included the land in controversy.

These lands were the lands that the Sioux City Co. had demanded a conveyance of from the State and that the Governor refused to convey and referred to in his Message of 1882, and which were so withheld in 1882, at the time of the passage of the resumption act and act of forfeiture by the Iowa Legislature, and were the lands referred to in said act. This list of lands, then, and now in the office of the Secretary of the State of Iowa, was the balance of the entire grant made for the purpose of securing the building of the railroad, granted by the General Government to the State, and the patenting to the said railroad company by the State of all lands earned by it for the building of all the road it did build, and the refusal to patent any more, and the action of the Governor and Executive officers, and of the Legislature of said State, was a full and complete adjustment of said land grant, and made by the State of Iowa through its proper and legally constituted authorities, as authorized in the granting act of the State, and said grant then was, and has since 1882, remained fully and completely adjusted, so far as the Sioux City Co. is concerned, or any one claiming under them, or by virtue of the act of March third, 1887.

That the said act of May 12, 1864, conferred upon the State of Iowa, through the Legislature thereof, not only the power and authority to bestow the land upon any railroad company it might select, but also authorized and empowered it through its legislature, with right, authority, and power of adjustment, forfeiture and resumption in case of the non-compliance, together with the right after having resumed, to secure the completion of the road by use of such lands, either by itself, or to another company.

That the State, having this authority of adjustment, forfeiture and resumption, as to these lands exercised it fully and completely, and then in 1884, relinquished all of said lands to which the Sioux City St. Paul Railway Co. would have had the right to the United States.

11. That said 85,457.40 acres were located in Dickinson, Plymouth, Sioux and O'Brien Counties, and included the northwest quarter of 17-97-42, O'Brien Co.

12. That no further or other adjustment of the lands was ever made so far as the Sioux City Co. was concerned either by the State or by the United States; nor were any of the said lands ever conveyed by the State of Iowa or by the United States to said Sioux City Co., or its successors or assigns or to any one for their use and benefits, but has remained the permanent adjustment of the grant to

said Railroad Co., and that at said time in 1882, when the Governor of Iowa refused to convey any of said land of said railroad Co., and when the Iowa Legislature recited the failure to complete said road in accordance with the terms and conditions of the grant and
7 resumed the same, said railroad company had received all the lands to which it was entitled on account of the building of the road from the Minnesota State line to Le Mars, in all amounting to 322,412.81 acres, which had been conveyed to it by the State.

13. That for many years after said adjustment and resumption and forfeiture of said grant and the relinquishment of the land herein in question by the legislature of the State of Iowa to the general government, said land remained open, unoccupied and unappropriated public land; and that in 1887, one Thomas Wier settled upon said northwest quarter of 17-97-42, and tendered a Homestead Filing thereon, which was refused; that said Wier built a house upon said land, and the same year sold his improvements to this defendant, who moved and repaired said house; in the Spring of 1888 built a stable thereon, and on the 5th day of April, 1888, moved on the land with his family, and has since continuously resided thereon; that he has broken out all the land except four acres of pasture, and has put in improvements thereon of the value of $1,000, that in the spring of 1888 he put in his first crop, he put it on the north eighty; that no parties other than the purchasers from the railroad company have claimed said land adverse to defendant; that he has ever since his settlement thereon continued to reside thereon, claiming the same as his home, under the homestead laws of the United States, and that on the 21st day of Jan. 1896, defendant tendered to the officers of the U. S. Land Office at Des Moines, Iowa, a Homestead filing for said land, with the necessary legal fees
8 therefor, which said filing fee for said land was, from some cause unknown, refused.

14. That on the 18th day of November, 1895, the Secretary of the Interior issued a Notice and Instructions relating to the entry of said land, including N. W. ¼ 19-97-42, a copy thereof being hereto attached, as Exhibit "A." That pursuant thereto, and on Feb. 27, 1896, the defendant appeared at the Local Land Office, at Des Moines, Iowa, and tendered his homestead filing for said N. W. ¼ Sec. 17, alleging his settlement, residence, and cultivation of said land and his legal qualifications to make said entry, all in full compliance with the law, and tendered the legal and proper fee, which filing and tender of fees the Land Office held in abeyance, pending a trial of the right of all parties concerned including his own right and the claim of plaintiff to purchase the North ½ of northwest quarter of said Sec. 17, under provisions of 4th section of Act of Mar. 3, 1887, as assignee of contract of sale of said land by Sioux City Co., to Ellen M. Childs, dated Sept. 11, 1888, a copy of said contract and assignment being hereto attached as Exhibit "B." That plaintiff had never attempted to comply with the homestead or settlement laws of the U. S.

15. That said contract was made after the passage of the act of March 3rd, 1887, and that said contract and the lands affected

thereby do not come within the terms of said act, nor the fourth section thereof. The title never having been in said company, nor any one for its use and benefit, the company never having earned nor been entitled to the land—the time having long since elapsed
9 within which it might be earned, and the state, which held the title under a special grant with full power of adjustment and forfeiture, having fully adjusted the grant and forfeited and resumed the land,—refusing to patent the same to the company. That said grant was legally and fully adjusted long prior to the passage of the act of Mar. 3rd, 1887, and the railway company had received the full amount of land that it was entitled to receive, and the time had elapsed in which it could build the road, or earn or receive any more land under the law, and that said act applied only to unadjusted land grants and only to sales made in good faith prior to the passage of the said act, and the purchase being long after all of this had been done, plaintiff was bound to take notice thereof and could not in law or equity be a good-faith purchaser.

That said contract of purchase was void, the same being contrary to the provisions of the granting act of 1864, which prohibited the sale, transfer, or incumbrance of said land until the same had been earned and patented to the said company, which was never done, and of all of which plaintiff was bound to take notice. That under the law and facts, no sale or purchase could be made at the time it was made of the land described, whereby the purchaser could be entitled to the provisions of the act of Mar. 3, 1887, and that said Ellen M. Childs and plaintiff were bound to take notice of the refusal of the State to convey said land to the railroad company, of the fact that it had already received all the land it was entitled to receive by reason of the building of the road from the State line to Le Mars,
10 only, of the acts of the Iowa legislature declaring said land forfeited, and of the relinquishment of the same to the United States in 1884, of the failure of the Company to construct said road, as declared by the said legislative act, within the time limit of the granting act of 1864, and that it could not at the time of the purchase, or ever, be entitled to receive said land, and that it was legally impossible for the purchasing claimant to have been a good-faith, innocent, or bona fide purchaser.

16. That on May 13, 1896, defendant at the U. S. Land Office, in Des Moines, tendered his application, affidavits of qualification, and $18, fees and commissions to enter said land under the homestead laws, alleging prior settlement, residence and cultivation since 1886; that the Register and Receiver issued notice fixing a date for a hearing, in which all persons claiming said land were ordered to appear, and on the 23rd day of April 1899, a trial was had and the Register and Receiver found and decided that Defendant was entitled to said land under his homestead application. The fact of his settlement in 1886, and continuous residence thereon since that time, and cultivation of said land, and his full compliance with the homestead laws were established, all of which facts as found, Defendant alleges to be true. Copy of said opinion is hereto attached marked exhibit "C." That Plaintiff appealed to the Commissioner of the General

Land Office, and on the 12th day of August, 1899, he decided in favor of defendant a copy of which opinion is hereto attached, as Exhibit "D." That plaintiff appealed from this decision to the Secretary of the Interior, and the Secretary unlawfully, and without any authority of law therefor, on Aug. 10, 1900, reversed the action of the Register and Receiver, and of the Commissioner of the General Land Office, and unlawfully, and without any authority of law, rejected defendant's application to enter said land under the homestead law, and allowed the entry and proof of plaintiff; a copy of said decision being hereto attached, as Exhibit "E." That in pursuance of said decision, and under the order of the Secretary of the Interior, the General Land Office has issued a patent to said land to plaintiff, solely under said so-called contract, under the fourth section of the act of March 3rd, 1887, and that said decision of the Secretary of the Interior is contrary to law, and absolutely void.

17. That defendant by reason of his long residence and cultivation of said land, and his homestead rights, and of the premises herein stated, is entitled to said land under the homestead laws of the United States, and to a patent thereto, and that the allowance of said patent to plaintiff, and the order of the issuance of the same, are all contrary to and without authority of law.

18. That defendant has never sold, relinquished, assigned, or abandoned his said homestead claim, and now resides upon the said land, and has already complied with the homestead laws as to residence, cultivation, etc., and is legally entitled to said land under said laws, and that proofs already made, accepted, admitted and found by the decision of the Register and Receiver and Commission of the General Land Office, should be accepted.

12 Prays that it be decreed that plaintiff holds the land in trust for defendant, and that decree will order and make transfer of title from plaintiff to defendant; that defendant be found the owner of the north half, northwest quarter of Sec. 17, Twp. 97, Range 42, and title quieted in defendant, and plaintiff's petition be dismissed, and defendant have general equitable relief.

(Foregoing is duly signed and verified.)

Exhibit "A."

This is an order, dated Nov. 18, 1895, written to the Register and Receiver at Des Moines, Iowa, signed by S. W. Lamoreaux, Commissioner General Land Office, and approved and signed by Hoke Smith, Secretary of the Interior, reciting the patenting of certain lands to the State of Iowa under the Act of Congress of May 12, 1864, for the Sioux City Company; said company's failure to complete the road; the withholding by the State of Iowa from the company of 85,457.40 acres of said land; the recovery of a part of this by the Chicago, Milwaukee & St. Paul Co., and the reconveyance of a part by the State to the United States; and the bringing of the action by the United States against the Sioux City Co. for the recovery of title to all the remainder (being the 21,979.85 acres.) Further recites

that said suit was decided by the Supreme Court of the United States on Oct. 21, 1895, in favor of the United States, and proceeds in this language:

"This leaves the title to the lands involved in the suit in the United States and subject to disposal by the Department.

13 Therefore, in order to carry their restoration to entry into effect, you will cause to be published for a period of thirty days, in some newspaper of general circulation in the vicinity of the lands, a notice that said lands, a particular description of which will be published with the notice, are restored to the public domain and will be subject to entry on a day to be affixed by the notice, which shall be ninety (90) days from the date of the first publication, and that all persons claiming any part thereof under the act of March 3, 1887, (24 Stat. 556), must come forward within the ninety days immediately following the first publication, and give notice of their claims by publishing their notice of intention to make proof in accordance with the requirements of the circular of February 13, 1889 (8 L. D., 348), upon a day which shall be subsequent to that affixed for the restoration."

A list of lands involved in said suit of the United States vs. Sioux City Co., and restored as above stated is included in this order, the same including the land in controversy, and totaling 21,979.85 acres.

Exhibit "B."

Land contract in usual form, dated Sept. 11, 1888, between Sioux City Co. and certain trustees thereof, as vendors, and Ellen M. Childs, as purchaser, for sale of land in controversy, at price of $1,270.64, of which $88 is acknowledged as paid and remainder provided to be payable in ten substantially equal payments, falling due annually thereafter, being interest at 8 per cent from date.

Endorsed upon this is a written assignment in usual form to Scott Logan of this contract and right title, interest and cl[illegible] in

14 the lands covered thereby, dated Oct. 8, 1889, signed and acknowledged by said Ellen M. Childs and Wm. Childs, her husband, reciting consideration of $228.

Exhibit "C."

Register and Receiver's Decision.

Finds from evidence produced, that land in controversy was bought by Mrs. Childs from Railroad Co. and assigned by her to plaintiff, as shown by Exhibit "B" above. Then says, "His (Logan's) evidence shows that at the time of assignment of the contract was made to him he knew that the Governor of Iowa had refused to patent land to the railroad company. Having bought with this knowledge, he could not have bought the land believing the railroad company had good authority to sell. His application is therefore rejected." As to defendant, finds that on Feb. 27, 1896, he was

living on the northwest quarter of said Sec. 17, "had been residing thereon for a number of years last past," had practically all of the land under cultivation, improvements estimated about $900. "We are of the opinion that his improvement and residence on the land at the date it was restored to entry are sufficient to give him the preference right of entry; his application, except the railroad right-of-way is therefore approved."

Exhibit "D."

Commissioner's Decision.

Finds making of contract by Railroad Company with Mrs. Childs and assignment to plaintiff, and that on Mar. 13, 1894, he "entered into a new or modified contract with the Company whereby
15 in the event of a decision by the Supreme Court adverse to the Company in the matter of title, he would surrender the original and modified contracts and receive from the Company the amount of money paid thereon with interest in full compensation of all demands against the Company on account of said contract." "The knowledge which Logan had of the state of the Company's title to this land, it is not necessary to consider since Logan entered into a modified contract, the terms of which are precisely the same as those contained in the contract by Ole Olson, in the case of Olson vs. Traver, 26 L. D. 350, and which the Department held was fatal to his claim as purchaser. Under this decision, the claim of Logan is eliminated from the case." For this reason affirms the former decision. Makes no finding of facts as to Davis.

Exhibit "E."

Secretary's Decision.

Recites the sale of the Railroad Company to Mrs. Childs, assignment to Logan and modified contract of March 13, 1894, between him and Company, then says: "He (Logan) paid, as consideration for the assignment, a sum largely in excess of that paid to the Company by the purchaser and made no further payments on the land, as, he states, he could not get possession after Davis took possession." "He relied upon the title of the Railroad Company, and awaited the result of the litigation against the Company." Recites that since the Commissioner's decision herein, the rule in the Oleson-Traver case as to the effect of making of modified contract similar to the one here involved, and upon which rule the
16 Commissioner's decision was wholly based, had been overruled in Burton vs. Dockendorf, 29 L. D. 479, and that such contracts are no longer recognized as fatal to the application for confirmatory patent. "Whatever possession Davis may have obtained of the tract was obtained after the purchase from the Railroad Company, and long after the tract had been patented to the State of

Iowa for the use and benefit of the Railroad Company. His settlement availed him naught as against the bona fide purchaser of the tract from the Railroad Company." The decision of the Commissioner as to Logan is therefore reversed, and his application for confirmatory patent allowed.

On Dec. 29, 1905, plaintiff filed

Reply to Answer and Answer to Counterclaim,

alleging as follows:

1. Denies every allegation in defendant's answer and counterclaim, except such as are hereafter admitted.

2. Admits the passage of Act of May 12, 1864, by Congress, admits Par. 4, and that part of Par. 5, excepting that portion which alleges that the Railroad Company had received from the State the amount of land the Company was entitled to; admits that the Governor of Iowa, January, 1882, sent to the legislature the message referred to in Par. 6, and that the 19th G. A. passed the act set out in Par. 7; admits the passage of Chapter 71 by the Legislature, set out in Par. 8; admits the giving of the notice attached to defendant's counter-claim as Exhibit "A," and the making and assignment of contract set out by defendant as Exhibit "B"
17 and admits that Exhibit "C," "D" and "E" set out by the defendant are correct copies of the decisions as they purport to be.

3. That Congress passed the Act of May 12, 1864, set out in Par. 3, that the Sioux City Company is a corporation, and was duly organized on or about Dec. 1st, 1864, under the laws of Iowa, and that by an act entitled (Here is set out in full Title 11 G. A. 134, abstracted in Par. 2 Stip. of Facts): The State of Iowa accepted the grant of lands in Act of May 12, 1864, and designated the said Sioux City Company as the beneficiary of said grant.

4. That by an Act approved April 20th, 1866, the State repeated its acceptance of the grant of said land, and provided the manner in which same should be held and conveyed. Said last named Act was amended by Act approved March 24, 1868.

5. That on Sept. 19th, 1866, the said Railroad Company duly accepted the provisions of said grant of Congress, and of the several Acts of the Legislature of Iowa, in reference thereto.

6. That commencing Sept. 27, 1866, and ending Oct. 4, 1866, said Railroad Co. definitely located its line of road from Sioux City to the south line of Minnesota at the proper point by surveying and staking out the same, and on July 10, 1867, duly filed a map of said location and route of said road in the offices of the Governor and Secretary of State of Iowa, and immediately thereafter said Governor duly filed such map with the Secretary of the Interior of the U. S. That said located line passed diagonally through the land in
18 controversy, and said railroad was in fact constructed along and upon the east line thereof.

Par. 7. That the Secretary of the Interior on July 16th, 1867, accepted said map of definite location as the basis for adjustment of

the said land grant, and transmitted said map to the Commissioner of the General Land Office, with instructions to direct the local land officers to withdraw the land so granted to the State of Iowa from sale or other disposal.

Par. 8. That on Aug. 26, 1867, the Commissioner of the General Land Office by an order directed to the Register and Receiver of the United States Land Office at Sioux City, duly withdrew from sale or disposal all of the odd numbered sections within the limit of 20 miles on each side of said line as shown by said map and reserved and selected the same as land inuring to the state of Iowa for the use and benefit of the said Sioux City Company under the trust created by said Act of Congress, and directed that the even numbered sections within said limits be held for sale and disposal at the double minimum price for said lands, and that all of the odd numbered sections within said limits were thereby withdrawn from entry.

Par. 9. That during the year 1872 and prior to Oct. 1 1872, said Sioux City Company constructed said road in a good and workmanlike manner as a first class road in full compliance with the Acts of Congress and Legislature of Iowa from the Minnesota line to Le Mars, Iowa, substantially along said line of definite location,
19 being a distance of 56¼ miles, completing the first ten mile section June 15th, the second ten miles June 29th, third ten miles July 15th, fourth ten miles Aug. 10th, fifth ten miles Sept. 10th, and into Le Mars Sept. 25th, and acquired the right to run and operate trains from Le Mars to Sioux City over the Iowa Falls & Sioux City Railroad Company's line, thus forming a continuous line from St. Paul to Sioux City.

Par. 10. That the land in controversy herein lies within the ten mile limit of the line of railroad so located and constructed and put in operation by the said Company, in 1872, and opposite the third completed ten mile section thereof, and distant about 22 miles from the north end of the said road on the south line of Minnesota, and that by reason of the construction of said road in compliance with the act of Congress aforesaid, that the said Railroad Company did, in fact, earn, and was entitled to the land in controversy, the same being within the ten mile limit of said road, unoccupied, open and vacant land, free from all pre-emption, homestead, tree claim or other rights of any and all persons, whomsoever, at the time of filing of said map of location and the approval thereof, as provided by the said Acts of Congress.

Par. 11. That Cyrus G. Carpenter, Gov. a Governor of Iowa, duly certified to the Secretary of the Interior the construction and completion in a good, substantial and workmanlike manner as a first class railroad, and that cars were operating thereon, of the first two ten mile sections of said road from the Minnesota line southerly on July 26, 1872, and in like manner certified the third ten mile
20 section on Aug. 10, 1872, and in like manner certified the fourth and fifth ten mile sections on Feb. 4, 1873, and upon such certification being made said Sioux City and St. Paul Railroad Company thereupon became, and was entitled to have, hold, own and

possess one hundred (100) sections of land, granted as aforesaid, for each of said ten mile sections so constructed and certified.

Par. 12. That on Feb. 25th, 1873 said Sioux City & St. Paul Railroad Company selected the land in controversy, with other lands, as part of the lands inuring to said company under said Act of Congress of May 12, 1864, and filed a written list of said selection with the Register and Receiver of the U. S. Land Office at Sioux City, which officers on March 5th, 1873, allowed and approved the filing of said list and certified the same as being within the ten mile limits of said grant and as being free and clear from homestead, preemption or other valid claim, which said list was duly transmitted to the Commissioner of the General Land Office, who duly approved the selection of said land by said Railroad Company, and transmitted to the Secretary of the Interior a list embracing said tract, and the Secretary of the Interior duly approved the said selection and certification, and caused copies of said list to be filed with said Register and Receiver at Sioux City, and with the Governor of Iowa. And on the 17th day of June, 1873, the Secretary of the Interior caused to be issued to the State of Iowa, for the use and benefit of the said Sioux City Company, a patent embracing the land above referred to and including the land in controversy, as and for part of the lands
21 inuring to the said State of Iowa, for the use and benefit of said Sioux City Company, under the Act of Congress of May 12, 1864, as aforesaid.

Par. 13. That the General Assembly of Iowa by an Act entitled (Here appears title of Act chap. 34, P. L. & T. Laws 1874, abstracted in Par. 16 Stip. of Facts), approved Mar. 13, 1874, authorized and directed the Governor to certify to said Sioux City Company all the lands held by the State in trust for the benefit of said company, and the land in controversy was a part of the lands then held by the State, under said patent, in trust for the use and benefit of said company, and was a part of the lands so directed to be conveyed to the said company, and was a part of the lands which in fact had been earned by it and by said acts the equitable title and real ownership thereof vested in the said Railroad Company.

Par. 14. That said Railroad Company had earned and was entitled to receive, have, own, hold and possess all alternate odd sections of land within the ten mile limit on the line of railroad as so mapped and located, and which were co-terminus with the sections of road which had been completed, and which were not held by valid preemption, homestead or other claims which operated to prevent the said alternate sections from passing under said grant, and including land in controversy.

Par. 15. That on April 7th, 1879, the Chicago, Milwaukee & St. Paul Railway Company commenced in the U. S. Circuit Court for the District of Iowa, an action against the Sioux City Com-
22 pany to recover certain lands claimed by said Sioux City Company as a part of its grant, including the land in controversy, and decree was entered therein on May 21, 1886.

Par. 16. That pursuant to said decree, commissioners were duly appointed to partition certain lands which commissioners did there-

after set out in severalty to said Sioux City Company the land in controversy as a part of the land earned by said company, and said commissioner's acts on Oct. 28, 1886, confirmed by said court.

Par. 17. That the Secretary of the Interior, having before him the question of the quantity of lands to which said Sioux City Company was entitled, by reason of the construction of the said five sections of ten miles each, and upon the application of certain settlers occupying lands claimed by the company in the county of O'Brien, did, on July 26th, 1887, render a decision therein and did hold that the grant to said Railroad Company was then unadjusted, and that in any event the said railroad company was entitled to at least 4,101.86 acres out of the 21,692.18 acres as earned lands under the grant, and directed the Commissioner of the General Land Office to make an adjustment of the grant in accordance with the views set forth in said decision, which decision is officially reported on pages 54 to 71, Vol. 6 of Land Decisions of the Department of the Interior, which is made a part hereof as fully as if set forth herein.

Par. 18. That Congress by an Act entitled (here appears title Act Congress Mar. 3, 1887, abstracted in Par. 26 Stip. of Facts),
23 approved March 3, 1887, (24 Stat. 556) did direct and authorize the Secretary of the Interior to immediately adjust, in accordance with the decisions of the Supreme Court, each of the railroad land grants made by Congress to aid in the construction of railroads, and theretofore unadjusted, and the grant in question had not theretofore been adjusted.

Par. 19. That on Sept. 11th, 1888, one Ellen M. Childs, believing that the land in controversy belonged to the said Sioux City & St. Paul Railroad Company, and relying upon the facts herein set out, and that the said land had been duly earned by the said Railroad Company, and had been recognized by the United States and the State of Iowa as the property of the said Railroad Company, and without any knowledge or notice of anything to the contrary, or of any facts which would defeat the right of the Railroad Company thereto, purchased said land from said company for a valuable consideration, contract of which purchase is attached to the defendant's counterclaim as Exhibit "B," and entered into possession of said land thereunder, the same being at that time in the actual possession of said Railroad Company through a tenant who was then farming the same, and same having been at all times prior to the possession of said tenant vacant and unoccupied land.

Par. 20. That on Oct. 8, 1889, plaintiff purchased the land in controversy from said Ellen M. Childs, copy of assignment of said contract being attached as part of Exhibit "B" to defendant's counterclaim. Said purchase was for a valuable consideration, without notice of any defect of any kind in the title thereto and in
24 full reliance upon the facts herein set out, and upon the fact that the said land had been earned by the said Railroad Company, and that the title of the said company thereto, and its rights therein, had been recognized by the United States and the State of Iowa, and without knowledge or notice of any facts which would in any way defeat the right of the said Railroad Company to said land.

Par. 21. Said Ellen M. Childs purchased said land under the good faith belief that said Railroad Company had earned and had full right and authority to sell the same, and the plaintiff purchased from her under the full belief that the said Railroad Company had full right and authority to sell the same, and when she was in possession thereof, she having held continuous and undisputed possession from the date of her said purchase, to the time of the sale to plaintiff, who, by reason of his purchase from her, entered into possession and continuously so remained until possession was surreptitiously taken by the defendant in the year 1890, as hereafter stated.

Par. 22. That said Ellen M. Childs and plaintiff were at all times citizens of the U. S. That after plaintiff's purchase an extension agreement was made between him and the said Railroad Company, providing that all payments not then made should be, and they were thereby extended until a date ninety days after the filing of the decision of the Supreme Court of the U. S. on the appeal taken in the action, in which the U. S. sought to recover said land, and other lands, and have its title thereto quieted, and which resulted in the quieting of the title of the U. S. thereto.

25 Par. 23. That in October, 1889, an action was commenced by the United States against the Sioux City Company and others, in the U. S. Circuit Court for the Northern District of Iowa, Western Division, to quiet title in the United States as against said defendants named in said action, to the land in controversy with other lands, but to which action neither said Ellen M. Childs nor plaintiff were parties.

Par. 24. That on Oct. 20, 1890, a decision was rendered in said action (43 Fed. Rep. 617), and on December 18, 1890, a decree was entered therein quieting title in the United States, from which decree said company appealed to the U. S. Supreme Court.

Par. 25. That on Oct. 21st, 1895, the U. S. Supreme Court affirmed said decree (159 U. S. 349), and on Nov. 18, 1895, the Commissioner of the General Land Office, by letter approved by the Secretary of the Interior, directed the restoration to public entry of the lands embraced in said decree, on a date to be fixed which should be 90 days after first publication of notice thereof, which notice should include a notice to all persons claiming under Act of Congress of Mar. 3, 1887, as purchasers from the Sioux City Company of any of said lands, to come within said ninety days and give notice of their claims, said notice was duly published and Feb. 27, 1896, duly fixed as date upon which said lands would be restored to public entry and plaintiff within said 90 days, on Jan. 17, 1896, gave due notice of his claim to land in controversy under said Act of Mar. 3, 1887, and upon due proceedings had upon said claim before the U. S. Land Office, the Register and Receiver

26 thereof rendered decision, set out as Exhibit "C" to defendant's counterclaim.

Par. 26. That upon successive appeals from said decision, the Commissioner of the General Land Office, and the Secretary of the Interior duly rendered decisions set out as Exhibits "D" and "E,"

respectively, to defendant's counterclaim, and that in conformity with said decision, of the Secretary of the Interior, patent of the U. S. was duly issued to plaintiff to the land in controversy on May 27, 1901.

Par. 27. That after the passage of the Act of Congress of May 12, 1864, the U. S. government at all times prior to the institution of said action by it against the Sioux City Company, as hereinbefore alleged, treated the land mentioned and described in said grant, including the land in controversy, as having passed under and by virtue of said grant to the said Sioux City and St. Paul Railroad Company or to the State of Iowa, for the use and benefit of said Railroad Company, and permitted and allowed said Railroad Company to handle and sell said land and to exercise all acts of ownership over the same, such as maintaining suit in the U. S. Court in partition, and otherwise, against the Milwaukee Company, causing the same to be decreed to be the land of the said Sioux City Company, and by Commission duly appointed by the U. S. Court, to be partitioned between the said respective railroad companies; and allowed the said Sioux City Company to sell and dispose of said lands, including the land in controversy, as owner thereof, and to cause the same to be assessed for taxation in the usual man-
27 ner, as the lands of the said Sioux City Co. and permitted the said Co. to pay taxes thereon from year to year as owners thereof and during all said period the U. S. government was denying that the said lands were the lands of the said government, and refusing to receive or recognize homestead applications therefor made by various individuals under the Homestead Act, and at all times refused and failed to act in harmony with the several acts of the Legislature herein referred to, looking to the restoration of said land to the United States, and failed, neglected and refused to accept such relinquishment of the State of Iowa to the United States of said lands; and all of said things the U. S. Government did and suffered to be done continuously and without abridgement, until it instituted said action against said Sioux City Company in October, 1889, after the purchase of the land in controversy by this plaintiff and said Ellen M. Childs. That upon the passage of the said Act of March 3, 1887, the U. S. government, through whom defendant claims title and interest in and to the land in controversy, acting thro' its proper officers, took action to adjust the grant to the State of Iowa, for the use and benefit of the Sioux City Company, under the Act of May 12, 1864, and in pursuance of said Act of March 3, 1887, began and prosecuted said action against said Railway Company as above set forth, and in said action the U. S. government in said court of equity, alleged, urged and maintained that the provisions of said Act of March 3, 1887, applied to said grant of May 12, 1864, and to the lands therein granted, and after the said final decision in said action was rendered by the U. S. Supreme
28 Court, the said Government still *insisted* that the said grant of land was within the provisions of the Act of March 3, 1887, and that the said grant of May 12, aforesaid, had not been adjusted, and through its proper officers, placed the said lands for

disposition under the provisions of said Act of Mar. 3, 1887, and by means of proper notice and proclamation invited all purchasers thereof, including this plaintiff, to appear at the time named in such notice and proclamation and comply with the provisions thereof and make proper proof of purchase from the said Railroad Company, pay the purchase price therefor, and upon compliance with its provisions it held out and represented that said land would and should be patented and conveyed to such purchasers of which class of purchasers this plaintiff was and is one.

Par. 28. That in addition to the other matters alleged herein as inducing plaintiff to believe in good faith that the said Railroad Company had earned the land in controversy and had full right and lawful authority to sell and dispose of the same, and upon which plaintiff relied in making purchase of said land and expending money in connection therewith, he was induced and so led to believe on account of the record title to said land as shown by the official records in the office of the Recorder of O'Brien County, Iowa, to-wit:

Grant by the United States to the State of Iowa for the use of said Sioux City Co. recorded in original entry book, page 134.

Patent United States to State of Iowa for use of Sioux City
29 Co., dated June 17, 1873, filed for record May 23, 1887, and recorded in book 24, page 184. (Abstracted in Par. 59 of stipulation of Facts.)

Trust deed from Sioux City Co. to Alexander H. Rice and Elias F. Drake, trustees, to secure bonds of $2,800,000. Dated Aug. 1, 1871, filed for record May 25, 1882, in book "B" page 12.

Sioux City Co. to Elias F. Drake and Amhurst F. Wilder, trustees, conformation deed made to ratify and confirm trust deed of Aug. 1st, 1871, and more fully describe land, dated Feb. 25, 1884, filed March 25, 1886, and recorded in book "R" page 246.

Copy of decree in case Milwaukee vs. Sioux City Co., et al., in U. S. Circuit Court, giving this land to the two roads jointly, dated March 25th, 1886, filed May 21, 1886, and recorded in book 23, page 197. (Abstracted in Par. 22. Stip. of Facts.)

Report of Commissioners appointed by U. S. Court, partitioning this land between the two railroad companies, and approval by Court, dated Oct. 25, 1886, filed Dec. 3, 1886, recorded in book "I" page 252.

Resignation of Alexander H. Rice, trustee, dated Feb. 13, 1880, filed for record July 29, 1880, recorded book "E" page 235.

That the various instruments referred to above contained a description of the lands in controversy, together with other lands granted and patented to the State of Iowa, by the U. S. for the use of the Sioux City Co.

Par. 29. That by reason of the Acts of the U. S., as herein alleged, plaintiff, in good faith, incurred great expense in purchas-
30 ing land in controversy from and through said railroad Co., in procuring counsel and in paying expenses of the contest before the U. S. Land Department, and plaintiff, relying upon the acts and conduct of the U. S., as herein alleged, upon being awarded

said land by the Land Department, paid to the U. S. the full price thereof, to-wit: $216.08.

Par. 30. That defendant made his attempted filing upon said land under the Homestead law long after plaintiff had purchased same from said railroad company, long after the United States had brought and successfully prosecuted to final decision in the U. S. Supreme Court said action against said Co., and long after the U. S. had invited purchasers, including this plaintiff, to proceed to comply with the provisions of the Act of March 3rd, 1887, and defendant claims title to said land under, by and through said U. S. Government and in privity therewith. That the United States is now estopped by reason of its acts and conduct, as detailed in Pars. 27-28 and 29, and by reason of its acceptance and retention of the money so paid by plaintiff as the purchase price of land in controversy, from now maintaining that plaintiff did not acquire title in fee simple to said land, and from questioning the validity of said patent so issued to plaintiff, and from maintaining that the Act of March 3, 1887, does not apply to said grant, or to said lands or that said grant had, previous to the said Act, been adjusted; and defendant being a claimant of title by, through and under said U. S., and in privity with it,
and his claim having originated subsequent to the purchase of
31 said land from the said railroad company by plaintiff and
those through whom he claims, and long after the U. S. had proceeded under the Act of March 3, 1887, and defendant, having knowledge at the time of making application to homestead said land of the matters recited in Pars. 27-28 and 29, and of the good faith of plaintiff in making said purchase, and attempting to procure title to said land under the Act of March 3, 1887, is likewise now barred and estopped from questioning the validtiy of the patent so issued to plaintiff, or in any manner questioning the right, title or interest of plaintiff in or to said land, or claiming that defendant is entitled to homestead said land.

Par. 31. That defendant has no title, right or interest whatsoever in or to said land by reason of which he, in law or equity can or should maintain this action, or question the title of plaintiff under said patent so issued by the U. S. to him; that defendant has no right, title or interest, whatsoever, in or to said land, and he has no such interest as can or should form the basis for any action in this court to question the title and interest of plaintiff.

Par. 32. That the Act of Congress of May 12, 1864, set forth the conditions upon which the land should be conferred upon the Railroad Co. and provided:

"That the lands hereby granted shall be disposed of by said state, for the purposes aforesaid only and in the manner following, namely: When the Governor of said State shall certify to the Secretary of the Interior that any section of ten consecutive miles of either said roads
is completed in good, substantial and workmanlike manner as
32 a first class railroad, then the Secretary of the Interior shall
issue to the State patents for one hundred (100) sections of land for the benefit of the Road having completed the ten miles as aforesaid." That said Sioux City Co., as heretofore alleged, acting

under said grant, constructed its road and did all acts in compliance with said grant and the Governor duly certified the completion of the ten mile section, opposite which the land in controversy lies and thereupon patent was issued by the U. S. to the State of Iowa on June 17, 1873, copy of which is hereto attached as Exhibit "I;" that the same recites full compliance on the part of said Company with the Act of May 12, 1864, and that "the United States of America, in consideration of the premises and pursuant to the said Act of Congress, have given and granted, and by these presents do give and grant unto the said State of Iowa, for the use and benefit of the Sioux City Co., of said state and its assigns, the tracts of land selected as aforesaid, and described in the foregoing; to have and to hold the said tracts with the appurtenances unto said state for the use and benefit of the said Sioux City Co., and its assigns forever."

That by virtue of said patent and the several acts aforesaid preceding the issuance thereof, the equitable title to said lands vested in the said Railroad Company and the State of Iowa held the naked legal title thereto in trust for the use and benefit of said railroad company. That said Ellen M. Childs and plaintiff, at the time of their respective purchases of the land in controversy, each in good
33 faith believed that said Railroad Co. had earned and owned said land and had fully complied with the provisions of said grant. That they knew the facts set forth in this paragraph and the recitals in said patent to the State of Iowa, believed said recitals to be true, and bought said land in good faith relying thereon. That at said times no persons, other than themselves and said railroad company were in possession, no homestead or pre-emption claimant was asserting any claim thereto nor did they know that said lands were subject to forfeiture, or had been forfeited, or attempted to be forfeited, or the title resumed by the United States, nor had any action been brought by the United States to adjust said grant, recover said property or to declare a forfeiture thereof. That they paid the full value of said land. That defendant did not apply to homestead said land until long after they had expended their money in the purchase and improvement thereof. That while plaintiff has received a patent to said land from the United States, under and by virtue of the Act of March 3, 1887, he avers that he was and is entitled to the said patent and said land by virtue of the purchase thereof, as aforesaid, and the facts herein alleged. That the United States, by reason of the facts herein alleged is, and at all times since the purchase of said land by said E. M. Childs has been estopped from denying that said lands were earned by said Railroad Company, that the title thereto had passed to said Company and from claiming, or maintaining that said lands reverted to the U. S. or that plaintiff has no title or interest therein; and by reason of the facts alleged herein,
and of the receipt and the retention by the U. S. of this plain-
34 tiff's money in payment of the full purchase price of said land, it is estopped from questioning the validity of the patent issued to plaintiff or the regularity of the proceeding under which the same was obtained; that the defendant claims title and interest in said land under, by and through said United States under the

claim of homestead right which was initiated, if at all, long after said purchase by said E. M. Childs and this plaintiff, and with full notice and knowledge on his part, of the rights of plaintiff as herein alleged, and of all the facts herein alleged, and that he is in like manner barred and estopped from maintaining this action, questioning the title of plaintiff or the validity of plaintiff's patent, or claiming that his title or interest in said land is superior to that of plaintiff.

Par. 33. That if it be held by the Court that said Act of Congress of March 3, 1887, does not apply to the grant of May 12, 1864, then defendant cannot maintain his cou-ter-claim in this; That under said Act of May 12, 1864, the land in controversy was withdrawn from public domain which was subject to homestead entry, and was thereby reserved from the operation of the Homestead Law under which defendant sought to secure title to said land, and upon which he bases his right to maintain this action, and if the said Act of March 3, 1887, does not apply to said lands or the said grant of May 12, 1864, then said land was at the time of his application to homestead the same, and at all times since 1867 has been, reserved from the operation of the Homestead Laws of the U. S., and there has been no act of Congress or lawful proceeding taken opening
35 said lands to homestead entry or settlement, and the defendant acquired nothing by his application, and he has no such right, title or interest as authorizes him to maintain this action, or question plaintiff's title or patent to said land.

Par. 34. That at the time of the sale of the land in controversy to Ellen M. Childs, and also at the time of her sale to plaintiff, said land was not in the bona fide occupancy of any adverse claimant under the pre-emption laws or homestead laws of the U. S.; that said land was sold to her by said Company as part of its grant: that the same had not been settled upon at any time subsequent to D-c. 1882, and prior to the purchase of the said Ellen M. Childs by any person or persons claiming right to enter the same under settlement laws of the United States.

Par. 35. That from the date of the purchase by said Ellen M. Childs she maintained exclusive possession of the said land until the sale of the same to plaintiff, and since said sale plaintiff maintained exclusive possession of the said land until about the first day of May, 1890, at which time defendant secretly, surreptitiously, unlawfully and without any shadow of right violently entered into possession of said premises and has ever since kept the plaintiff out of possession thereof under the pretense that he holds a part of the same, to-wit:—the Northwest quarter of said Section seventeen under the homestead laws of the United States.

Par. 36. That said patent issued by the United States to the State of Iowa, Exhibit one hereto, embracing the land in controversy and other lands, contained recitals as to the compliance by
36 said railroad company with the provisions of said grant as shown in full by said copy, and the U. S. by such recitals in said patent did, in substance and effect, declare that the Sioux City Co. had so complied with the provisions of said grant of May 12, 1864, as to have earned the land in controversy under said grant,

and as to them be entitled to receive, hold and own the same, and to receive a conveyance thereof. And by reason of the said patent and the recitals therein, the United States is estopped and the defendant herein, claiming in privity with the United States, is likewise estopped from claiming, asserting or maintaining that the said land in controversy had not at said time been duly earned by the said Railroad Co.; that said Railroad Co. had not at said time so complied with the Act of Congress of May 12, 1864, as to be entitled to receive, hold and own said land and to receive the conveyance thereof; that the Acts of the 19th and 20th General Assemblies of the State of Iowa, set forth in defendant's answer and counterclaim, referred to or included the land in controversy herein, or affected the same in any way; that the land in controversy, reverted to either the State of Iowa or the United States; that the said Railroad Company did not have good right and lawful authority to sell said land to said Ellen M. Childs; that this plaintiff did not, by his said purchase of said land, through and under said Railroad Company obtain good and perfect title to said land, as against the said U. S. and defendant, or that this plaintiff has no right or interest in said land. That the U. S. and the defendant are estopped as
37 aforesaid, against plaintiff who is in privity of title and estate with the said Sioux City Company, and with said State of Iowa, grantee in said patent for the use and benefit of said Railroad Company. That plaintiff is entitled to and does assert and maintain title to the land in controversy through, under and by, virtue of the right and title of said Sioux City Co., derived as aforesaid, and the purchase thereof by plaintiff, as well as upon the patent issued by the United States to plaintiff.

Par. 37. That the Government price of $2.50 per acre, or $216.08 was paid and caused to be paid by the said plaintiff to the United States, relying upon the decisions and findings of the said U. S. Land Department, that this plaintiff was a good faith purchaser of the land in controversy from the Sioux City Co., within the meaning of the said Act of Congress of March 3, 1887, and that by reason thereof, and of the retention of said purchase money by the United States, the United States is estopped, and the defendant herein, claiming in privity with it is likewise estopped from claiming, alleging or maintaining that this plaintiff was not a good faith purchaser of said land within the meaning of the Act of Congress of March 3, 1887, or that the patent issued to the plaintiff herein is invalid, or that the plaintiff's title based thereon is invalid, and that the defendant is likewise estopped in manner, form and substance, as is alleged in Par. 30 hereof; that the United States is estopped.

Par. 38. That for many years prior to the passage of the Act of March 16, 1882, by the Legislature of Iowa, and for many
38 years after the passage thereof, to-wit, until and including the year 1895, the State of Iowa caused to be collected from the land in controversy taxes annually levied thereon by the officers duly authorized by the State of Iowa to levy taxes, and that said State of Iowa thereby recognized that said lands were subject to taxation, and not the property of the United States, and that the

same had been earned by the said Sioux City Company, and that said company was entitled thereto, and thereby recognized and construed the said Act of March 16, 1882, as not applying to the land in controversy and that plaintiff and his said grantor, were entitled to rely upon the said Act of the State of Iowa, and said recognition by said State that said lands had been earned, and the said construction thereby placed by the State upon said Act of the Legislature, and this plaintiff and said Ellen M. Childs knew of said facts and did rely thereon in their said purchases of said land respectively, and the said State of Iowa, having placed said construction upon the said Act of its Legislature, the same is binding upon all persons, including the defendant in this action.

Wherefore plaintiff asks that his title to the land in controversy be quieted as against defendant, and that the cross petition of defendant be dismissed, and for general equitable relief.

(Foregoing is duly signed and verified.)

EXHIBIT "1."

(Abstracted in Par. 59, Stip. of Facts.)

Order Transferring to Equity Docket.

39 On Feb. 24, 1903, upon motion by defendant duly made therefor, this cause was duly ordered by the Court transferred to the Equity Docket for trial as an equity case.

On Feb. 29, 1908, this cause was duly tried and submitted to the Court as an equity cause and the following

Evidence

was offered, and the same is all the evidence offered or introduced by any of the parties, all thereof being in the form of written and documentary evidence, duly taken or stipulated and filed herein.

Stipulation of Facts.

For the purpose of the trial of this cause it is hereby stipulated and agreed that the following statements of fact, together with the exhibits hereto attached, and herein referred to, shall be received and considered as evidence in the cause with the same force and effect as if taken in the usual manner, and subject to the same objections as though the originals were in each case offered, introduced and returned; that all objections to the materiality of the testimony may be taken upon the hearing of the case; nothing, however, in any objection made shall be considered as raising the question that the said statements of fact, or said exhibits are not the best evidence.

Par. 1. That the U. S. Congress passed the following Act, published as 13 Stat. 72, approved May 12, 1864, entitled: (Full title.)

"Be it Enacted, By the Senate and House of Representatives of the United States of America in Congress assembled, that
40 there be, and is hereby granted to the State of Iowa for the purpose of aiding in the construction of a railroad from Sioux City in said state to the south line of the state of Minnesota, at such point as the said state of Iowa may select between the Big Sioux and the West Fork of the Des Moines River. (Provision relating solely to McGregor and Western grant omitted.)

Every alternate section of land, designated by odd numbers, for ten sections in width on each side of said roads, but in case it shall appear that the United States have when the lines or routes of said roads are definitely located, sold any section, or any part thereof, granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same or that the same has been reserved by the United States, for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected for the purposes aforesaid, from the public lands of the U. S. nearest to the tiers of sections above specified, so much land in alternate sections or parts of sections designated by odd numbers, as shall be equal to such lands as the U. S. have sold, reserved or otherwise appropriated, or to which the right of homestead settlement or pre-emption has attached as aforesaid, which lands thus indicated by odd numbers and sections, by the direction of the Secretary of the Interior, shall be held by the State of Iowa for the uses and purposes aforesaid; Provided: that the land so selected shall in no case be located more than twenty miles from the lines of said roads. Provided further, that any and all lands heretofore reserved to
41 the United States by any act of Congress, or in any other manner by competent authority for the purpose of aiding in any object of internal improvement or other purpose, whatever, be and the same are hereby reserved and excepted from the operation of this act, except so far as it may be found necessary to locate the routes of said roads through such reserved lands, in which case the right of way shall be granted, subject to the approval of the President of the United States.

SEC. 2. And be it further enacted: That the sections and parts of sections of land which by such grant shall remain to the United States within ten miles on each side of said roads, shall not be sold for less than double the minimum price of public lands when sold, nor shall any of said lands become subject to sale at private entry until the same shall have been first offered at public sale to the highest bidder at or above the minimum price as aforesaid; Provided that actual bonafide settlers under the pre-emption laws of the United States may after due proof of settlement, improvement and occupation, as now provided by law, purchase the same at the increased minimum price; and provided, also, That settlers under the provision of the homestead law, who comply with the terms and requirements of said act, shall be entitled to patents for an amount not

exceeding eighty acres each, anything in this act to the contrary notwithstanding.

SEC. 3. And be it further enacted, That the lands hereby granted shall be subject to the disposal of the Legislature of Iowa, for the purposes aforesaid, and no other; and the said railroads shall
42 be and remain public highways for the use of the government of the United States, free of all toll or other charges upon the transportation of any property or troops of the United States.

SEC. 4. Be it further enacted, That the lands hereby granted shall be disposed of by said State, for the purpose aforesaid only, and in manner following, namely; when the Governor of said State shall certify to the Secretary of the Interior that any section of the ten consecutive miles of either of said roads is completed in a good, substantial and workmanlike manner, as a first class railroad, then the Secretary of the Interior shall issue to the State, patents for one hundred sections of land, for the benefit of the road having completed the ten consecutive miles as aforesaid. When the Governor of said State shall certify that another section of ten consecutive miles shall have been completed as aforesaid, then the Secretary of the Interior shall issue patents to said State in like manner, for a like number, and when certificates of the completion of additional sections of ten consecutive miles of either of said roads are from time to time, made as aforesaid, additional sections of land shall be patented as aforesaid, until said roads, or either of them, are completed, when the whole of the lands hereby granted shall be patented to the State for the uses aforesaid and none other. (Provisions relating solely to McGregor & Western Road omitted.) Provided further. That if the said roads are not completed within ten years from their several acceptance of this grant, the said lands hereby granted and not patented shall revert to the State of Iowa
43 for the purpose of securing the completion of the said roads within such time, not to exceed five years and upon such terms as the State shall determine; and provided further, that said lands shall not in any manner be disposed of or incumbered except as the same are patented under the provisions of this act; and should the State fail to complete said roads within five years after the ten years aforesaid, then the said lands undisposed of as aforesaid shall revert to the United States.

SEC. 5. And be it further enacted, That as soon as the Governor of the said State of Iowa shall file or cause to be filed with the Secretary of the Interior maps designating the routes of said roads, then it shall be the duty of the Secretary of the Interior to withdraw from market the lands embraced within the provisions of this act.

SEC. 6. And be it further enacted; That the United States mail shall be transported on said roads and branch under the direction of the post office department, at such price as Congress may by law provide; Provided that until such price is fixed by law, the Postmaster General shall have power to fix the rate of compensation."

Par. 2. That the General Assembly of Iowa passed the following

Acts: An Act published as 11 G. A., Ch. 134, approved Apr. 3, 1866, and entitled: (Full title.)

SEC. 1. Accepts the grant provided for by Act of Congress of May 12, 1864.

SEC. 2. Grants to and confers upon Sioux City & St. Paul
44 Railroad Co. "so much of the lands, interests, rights, powers and privileges as are or may be granted and conferred in pursuance of" said Act of Congress for purpose of aiding in construction of road from Sioux City to south line of Minnesota.

SEC. 3. Said company shall locate line of route of said road as soon as practicable, file a map thereof with the Governor and Secretary of State of Iowa, and Governor shall file the same with the Secretary of the Interior. "The location of such line of road, however, shall be considered final only so far as to fix the limit and boundary within which lands may be selected under and by virtue of said Act of Congress."

SEC. 4. Road shall be built equal to average first class western road.

SEC. 5. Company shall accept the grant conferred by this Act by written instrument filed with Secretary of State of Iowa within six months from passage of Act.

SEC. 6. Said company is authorized and empowered to select and designate point on south line of Minnesota to which road shall be built as designated in said Act of Congress.

An Act published as 11 G. A. 144, approved Apr. 20, 1866, and entitled: (Full Title.)

SEC. 1. The lands, rights, powers, duties and trusts conferred upon State of Iowa by said Act of Congress are accepted by State.

SEC. 2. "Whenever any lands shall be patented to the State of Iowa, in accordance with the provisions of said Act of Congress, said lands shall be held by the State in trust for the benefit of the Railroad Company, as shall be ordered by the Legislature of the
45 State of Iowa, at its next regular session, or a- any session thereafter."

An Act published as 12 G. A. 42, approved Mar. 24, 1868, and entitled: (Full title.)

Amends the Act of Apr. 20, 1866, by correcting the date of the act of Congress which erroneously appeared therein as July 12, 1864, so that it would read May 12, 1864.

Par 3. It is agreed that the acts of Congress and General Assembly of Iowa, and decisions referred to in Pars. 1, 2, 16, 24, 25, 26, 31 and 32 hereof may be read from the official publication of said acts and decisions and shall be considered as offered in evidence herein with the same force and effect in both the trial court and on appeal, as though the official publications were offered in evidence.

Par. 4. That on Sept. 19, 1866, said Sioux City Co. by resolution of its Board of Directors, duly accepted the provisions of said Acts of Congress and of the General Assembly of Iowa, and of the grant created thereby, and on Sept. 25, 1866, filed in the Office of Secretary of State of Iowa, due acceptance thereof.

Par. 5. That on Sept. 27, 1866, said Sioux City Company commenced the location of its line of railroad under said grant at Sioux

City, and between that time and Oct. 4, 1866, definitely located its line by surveying and staking out the same from Sioux City to the south line of Minnesota, at a point selected by said company, between the Big Sioux river and the west fork of the Des Moines river, about equi distant from said streams and being the point of con-
46 nection on the south line of Minnesota with the land grant railroad from St. Paul and Minneapolis, provided for in the Acts of Congress Mar. 3, 1857, and of May 12, 1864, and forming with said road a continuous line of railroad from St. Paul and Minneapolis, Minn., to Sioux City, Iowa, as was contemplated by said Acts.

Par. 6. That on July 10, 1867, said railroad company filed in the office of the Governor of Iowa, and in the office of the Secretary of the State of Iowa, a map, showing the location and route of said railroad, duly certified by the officers of said company, and said map was duly certified as filed by said Governor and Secretary of the State of Iowa, and duly transmitted and on July 16, 1867, duly filed in the office of the Secretary of the Interior of the U. S. That said line of location is correctly shown on the map hereto attached as Exhibit "1", and is designated thereon by heavy red line, marked "located line Sioux City & St. Paul R. R."

Par. 7. That on July 16, 1867, the Secretary of the Interior duly accepted said map of definite location as a basis for the adjustment of the land grant made by said Act of Congress, May 12, 1864, and transmitted said map to the Commissioner of the General Land Office, with instructions to direct the local land officers to withdraw the land so granted to the State of Iowa from sale or other disposal.

Par. 8. That on Aug. 26, 1867, the said Commissioner of the General Land Office acknowledged the filing of said map as being in accordance with the said Act of Congress of May 12, 1864, and
47 by written order directed to the Register and Receiver of the Land Office at Sioux City, Iowa, he withdrew from sale or disposal all the odd numbered sections within the limit of twenty miles on each side of said line as shown on said map, and directed that the even numbered sections within the ten mile limits on either side of the road be held for sale or disposal only at $2.50 per acre, which order was accompanied by a map showing said ten and twenty mile limits, and which map showed the land in controversy to be within the ten mile limits. Said line of definite location in fact crossed through and over the land in controversy and said road was actually constructed immediately along the east side and adjacent to the land in controversy. Said ten and twenty mile limits are correctly shown on the map Exhibit "1" by heavy red lines marked "ten mile limit Sioux City & St. Paul R. R." and heavy blue lines marked "twenty mile limit Sioux City & St. P. R. R." and by the said order and direction as aforesaid, all the odd numbered sections within twenty mile limits of said line of location were withdrawn from entry and, except as they had theretofore been appropriated by pre-emptions having prior inceptions, they were reserved and selected as land inuring to the State of Iowa for the use and benefit of the said Sioux City Company, under the trust created by said Acts of Congress.

Par. 9. That said map of location and the Commissioner's order of withdrawal of said lands from entry, were duly received and filed in the office of the Register and Receiver of the U. S. Land Office at Sioux City, Iowa, on Sept. 2, 1867.

48 Par. 10. That in the year 1872, said Sioux City Company commenced the construction of its said line of road, and prior to Oct. 1st, 1872, had constructed in Sioux City 1.1 miles main track and .75 miles side track, and had constructed its road as a first class railroad in a good and workmanlike manner, commencing at the point of connection aforesaid on the south line of Minnesota, with the road already built from St. Paul and Minneapolis to said point, and running thence southwesterly on the line indicated by the black line on map, Exhibit "1", to and into Le Mars, Iowa, a distance of 56.25 miles. That it had completed the first ten miles of said road, southwesterly from the said point of commencement on the south line of Minnesota, prior to June 15, 1872; the second ten mile section prior to June 29, 1872; the third ten mile section prior to July 15, 1872; the fourth ten mile section prior to Aug. 10, 1872; the fifth ten mile section prior to Sept. 10, 1872; and the remaining 6.25 miles of said road prior to Oct. 1, 1872. That said Sioux City Company acquired the right to run and operate its trains from Le Mars to Sioux City, a distance of 24 miles, over the line of the Iowa Falls and Sioux City Railroad, then and still being operated under the control and management of the Illinois Central Railroad Company, and the said Sioux City Company has since said time continued to run and operate its trains over the said line so constructed by it, and the said line so controlled and operated by the Illinois Central Railroad Company between Le Mars and Sioux City, and in connec-

49 tion with said line in the State of Minnesota, and forming a continuous line of railroad from St. Paul and Minneapolis, Minn., to Sioux City, Iowa.

Par. 11. That the land in controversy at the time of the filing of said map of location and of the approval thereof, and at the time of the withdrawal of the lands from entry by order of the Commissioner of the General Land Office, as set forth above, and at the time of said filing of said map and order of withdrawal in the Office of the Register and Receiver, was unoccupied, open and vacant land and free from all homestead, pre-emption, tree-claim or other rights of any and all persons whomsoever, and that the same had not been sold by the U. S., nor reserved by the U. S. for any purpose whatsoever.

Par. 12. That a map of said railroad as actually constructed, was duly filed by said Sioux City Company in the office of the Secretary of the State of Iowa, on Feb. 4, 1873, duly certified, and said map, together with the additional certificates of the Governor and Secretary of State of Iowa, duly endorsed thereon, was on Feb. 10, 1873, filed in the office of the Commissioner of the General Land Office. That said constructed line as so shown on said last mentioned map, is shown upon map Exhibit "1," and is designated thereon by the black line marked "Constructed line St. Paul and Sioux City Rail-

road," and the same shows the dates of completion of the said ten mile sections of said road.

Par. 13. That immediately upon the completion of said sections of said road the said Sioux City Company commenced the running and operation of its trains thereon, and has continued to
50 operate said road as a first class railroad in all respects, in conformity with said Acts of Congress and of the Legislature of Iowa.

Par. 14. That on July 26, 1872, the Governor of Iowa duly certified to the Secretary of the Interior of the U. S. that two sections of the said railroad of ten miles each, had been constructed and completed from the south line of Minnesota in a southwesterly direction, in accordance with the provisions of the said Acts of Congress, making twenty consecutive miles of road; that the cars were then running thereon and that the same was constructed as aforesaid, and completed in a good, substantial manner in all respects as a first-class railroad; and on Aug. 10, 1872, the said Governor duly certified in like manner to the Secretary of the Interior that another section of ten consecutive miles was in like manner constructed and completed, and cars operating thereon, the land in controversy being opposite said third ten mile section of completed road; that on February 4, 1873, the said Governor so certified in like manner to the Secretary of the Interior that two more sections of ten miles each had been so duly constructed and completed as aforesaid, and the cars running thereon, making in all fifty consecutive miles of road.

Par. 15. That on February 25, 1873, the said Sioux City Company, by its duly authorized agents, selected the tract in controversy with other lands as, and for a part of the lands inuring to the said company under said Acts of Congress, and duly filed a written list of its selection with the Register and Receiver of the U. S.
51 Land Office at Sioux City, Iowa; said list and the filing thereof was on Mar. 5, 1873, duly allowed and approved by said officers, and said list was on said date duly certified by them as being lands within the ten mile limits of said road, and as being free and clear from all homestead pre-emption, tree-claim, state or other valid claims, and said list, so certified, was duly transmitted to the Commissioner of the General Land Office; that on June 9, 1873, said Commissioner of the General Land Office duly approved said selection of said lands by said railroad, and transmitted to the Secretary of the Interior a list thereof, embracing the said tract in controversy, and said Secretary of Interior on June 10, 1873, duly approved said selection and certification, and caused true copies of said approved list to be filed with the Register and Receiver of the U. S. Land Office at Sioux City, Iowa, and with the Governor of Iowa.

That on June 17, 1873, the Secretary of the Interior of the U. S. caused to be patented to the State of Iowa, for the use and benefit of the said Sioux City Company the tract in controversy herein, and a large amount of other land, as and for a part of the lands inuring to the said State for the use and benefit of the said Railroad Company, under the Acts of Congress, aforesaid.

Par. 16. The Secretary of the Interior patented to the State of

Iowa, for the use and benefit of the Sioux City Company 407,910.21 acres of land, less 40 acres twice patented, as follows:

52	Oct. 16, 1872	191,464.04
	June 17, 1873	205,374.76
January 25, 1875		10,911.41
June 4, 1877		160.00
		407,910.21
		40.00
		407,870.21

Of which 212,067.66 acres is within the granted or ten mile limits, and 195,842.55 acres is within the indemnity or twenty mile limit.

The State certified to the Sioux City Company, as inuring to it under the grant for the construction of five sections, 322,412.81 acres, 186,186.77 acres being within the granted limits and 136,226.04 acres within the indemnity limits. Of the lands certified to the Sioux City Company within the granted limits, there was lost to said company, in an action by the Milwaukee Company against the Sioux City Company, which was an action to determine the interest of the parties to the lands within the overlapping limits of the grant, 14,640.06, leaving 171,546.71 acres. There was lost to the same company in same action, within the indemnity limits, 27,047.46, leaving 109,178.58 acres, making the total of lands lost to the Sioux City Company, which had been certified to the Company by the State of Iowa, 41,687.52 acres; so that there remained to the Sioux City Company of the lands certified to it, 280,725.29 acres.

That the General Assembly passed the following Act published as Chap. 34 Private, Local and Temporary Laws of year 1874,
53 approved Mar. 13, 1874: "That the governor of the State of Iowa be and is hereby authorized and directed to certify to the Sioux City & St. Paul Railroad Company, any and all lands which are now held by the State of Iowa in trust for the benefit of said railroad company, in accordance with the provisions of Sec. 2 of Chap. 144 of the Laws of the Eleventh General Assembly."

Par. 17. That the Milwaukee Company became, through certain Acts of the Legislature of Iowa, successors to the McGregor & Western Company referred to in Act of May 12, 1864, and on Nov. 30, 1878, completed the construction of its road from South McGregor, Iowa, to the point of intersection with said line of the Sioux City Company at Sheldon, O'Brien County, Iowa.

Par. 18. That on April 7, 1879, the said Milwaukee Company commenced an action in the Circuit Court of the U. S., for the District of Iowa, against the said Sioux City Company, E. F. Drake and A. H. Rice, trustees thereof, and against John H. Gear, the then Governor of Iowa, and J. K. Powers, Register of the State Land Office of the State of Iowa, for the possession and to determine the

title of the lands embraced in the overlapping limits of the grants to said two railways and claiming said lands as belonging to it under said grants, and describing in its bill in said action all the lands within said overlapping limits, including the tract in controversy.

Par. 19. That in said action an injunction was issued against the said Governor and said Register of the State of Iowa, restrain-
54 ing them from in any way patenting or conveying to the said Sioux City Company the lands involved therein.

Par. 20. That the said Sioux City Company and A. H. Rice and E. F. Drake, trustees, on May 30, 1879, filed their joint answer to said bill, denying the right of complainant to said lands, and asserting and claiming the right and title in the said Sioux City Company thereto, under said grant.

Par. 21. That the said Governor of Iowa, and the said Register of the State Land Office filed their answer to said bill, denying and resisting the claim of said Milwaukee Company therein.

Par. 22. That thereafter said suit was duly tried in the Circuit Court of the U. S. for the District of Iowa, and thereafter upon appeal in the Supreme Court of the U. S., and such proceedings were had therein that on May 21, 1886, a decree was entered in said Circuit Court in pursuance to the mandate of the Supreme Court of the U. S., finding that said Sioux City Company had fully complied with the conditions of said Act of Congress of May 12, 1864, and that said Milwaukee Company had also complied therewith, and each of said companies had earned an undivided one-half of the granted lands within the over-lapping ten mile limits, same including the tract in controversy herein, and decreeing partition of said lands between said companies, for which purpose commissioners were duly appointed by said Court in said decree. Said decree found and provided, among other things, as follows:

It further appearing to said Court that defendant, Sioux City Company, has fully complied with all the conditions of said
55 Act of Congress, approved May 12, 1864, and with the Act of the Legislature conferring said grant upon the said Sioux City Company, and has fully completed said railroad within the time specified in said Acts, from the south line of Minnesota to Le Mars, and that it is entitled to receive all the lands applicable to said grant from said state line to Le Mars to the extent of ten sections per mile of road completed.

And it further appearing to said Court that (the tract in controversy, and other lands) are a part and portion of the grants so made by said Act of Congress and are within the overlapping limits of said grants and are all situated within the granted limits, that is, within ten miles of the definitely located lines of each of said railroads, and that said companies are jointly entitled to said lands, and that patents therefor should have been issued by the State of Iowa to the said companies jointly for all of said lands, but that by mistake all of said lands above marked as "patented" have been erroneously patented by the State solely to the defendant, Sioux City Company, and that an undivided one-half interest in the lands so patented should be released by said company to complainant, and that the

balance of said lands not patented by the State should be patented to complainant and said defendant Sioux City Company jointly.

It is adjudged and decreed that said defendant, Sioux City Company, has fully complied with all the conditions of said Act of Congress approved May 12, 1864, and with the Act of the Legis-
56 lature conferring said grant upon said defendant Sioux City Company, so far as relates to the lands in question, and fully completed the railroad within the time specified in the said Acts from the state line to Le Mars, and is entitled to receive all the lands applicable to said grant from said state line to the extent of ten sections per mile of road constructed, including all the lands hereinbefore described as belonging to that grant.

Par. 23. That in pursuance of said decree the lands involved therein, including the tract in controversy, were duly partitioned between said companies, the tract in controversy herein being duly assigned in severalty to the Sioux City Company, and said partition thereof was duly confirmed by said Circuit Court of the U. S. on October 28, 1886.

Par. 24. That the Legislature of Iowa passed the following Act, published as 19th G. A. Chap. 107, entitled (Full title), approved Mar. 16, 1882. Recites the grant to the state by Act of Congress of May 12, 1864, the conferring of the benefits thereof upon the Sioux City Company by the Act of Apr. 3, 1866, the provisions of said grant that lands should revert to the State if road not completed within ten years from acceptance, that the Sioux City Company had accepted grant on Sept. 20, 1866, but had failed to complete road between Sioux City and Le Mars. The enacting clause reads:

"That all lands and all rights to lands granted or intended to be granted to the Sioux City & St. Paul Railroad Company, by said Acts of Congress and of the General Assembly of the State of Iowa, which have not been earned by said railroad company by a
57 compliance with the conditions of said grant, be and the same are hereby absolutely and entirely resumed by the state of Iowa, and that the same be and are absolutely vested in said state as if the same had never been granted to said railroad company."

Par. 25. The Legislature of Iowa passed the following Act, published as 20 G. A. Chap. 71, approved Mar. 27, 1884, entitled (Full title). Recites the grant to the state by Act of Congress May 12, 1864, the acceptance by the state, and conferring the benefits of grant on Sioux City Company by Acts of April 3 and April 20, 1866, and that "said railroad company duly accepted said grant but failed to complete said railroad, as required by the terms and conditions of said grant." Also recites the passage by the Legislature of the Act of Mar. 16, 1882, resuming unearned lands by the state, and that "it is desirable that all lands and rights to lands resumed by the state of Iowa as aforesaid should be conveyed to and vested in the United States to the end that such lands shall be made subject to the use of actual settlers as provided by the Acts of Congress relating thereto; now therefore, Be it enacted, etc.

SEC. 1. That all lands and all rights to lands resumed and in-

tended to be resumed by chapter one hundred and seven (107) of the Acts of the 19th General Assembly of the State of Iowa are hereby relinquished and conveyed to the United States.

SEC. 2. The Governor of the state of Iowa is hereby authorized and directed to certify to the Secretary of the Interior all lands which have heretofore been patented to the state to aid in the
58 construction of said railroad, and which have not been patented by the state to the Sioux City & St. Paul Railroad Company, and the list of lands so certified by the Governor shall be presumed to be the lands relinquished and conveyed by Section 1 of this Act. Provided that nothing in this section contained be construed to apply to lands situated in the counties of Dickinson and O'Brien."

Par. 26. That Congress passed the following Act, published as 24 Stat., 556, entitled (Full title), approved Mar. 3, 1887:

Adjustment of Railroad Land Grants.

An Act to provide for the adjustment of land grants made by Congress to aid in the construction of railroads, and for the forfeiture of unearned lands, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the Secretary of the Interior be, and is hereby authorized and directed to immediately adjust, in accordance with the decisions of the Supreme Court, each of the railroad land grants made by Congress to aid in the construction of railroads, and heretofore unadjusted.

SEC. 2. That if it shall appear, upon the completion of such adjustments respectfully, or sooner, that lands have been, from any cause, heretofore erroneously certified or patented by the United States, to or for the use or benefit of any company claiming by through or under grant from the United States, to aid in the construction of a railroad, it shall be the duty of the Secretary of
59 the Interior to thereupon demand from such company a relinquishment or reconveyance to the United States of all such lands, whether within granted or indemnity limits; and if such company shall neglect or fail to so re-convey such lands to the U. S. within ninety days after the aforesaid demand shall have been made, it shall thereupon be the duty of the Attorney General to commence and prosecute in the proper courts the necessary proceedings to cancel all patents, certification, or other evidence of title heretofore issued for such lands, and to restore the title thereof to the United States.

SEC. 3. That if, in the adjustment of said grants, it shall appear that the homestead or pre-emption entry of any bona fide settler has been erroneously cancelled on account of any railroad grant or the withdrawal of public lands from market, such settler upon application shall be reinstated in his rights and allowed to perfect his entry by complying with the public land laws; Provided, that he has not located another claim or made an entry in lieu of the one so erroneously cancelled; And provided also, that he did not volun-

tarily abandon said original entry; And provided further, that if any of said settlers do not renew their application to be reinstated within a reasonable time, to be fixed by the Secretary of the Interior, then all such unclaimed lands shall be disposed of under the public land laws, with priority of right given to bona fide purchasers of said unclaimed lands, if any, and if there be no such purchasers, then to bona fide settlers residing thereon.

SEC. 4. That as to all lands, except those mentioned in the
60 foregoing section, which have been so erroneously certified or patented as aforesaid, and which have been sold by the grantee company to citizens of the United States, or to persons who have declared their intention to become such citizens, the person or persons so purchasing in good faith, his heirs or assigns, shall be entitled to the land so purchased upon making proof of the fact of such purchase at the proper land office, within such time and under such rules as may be prescribed by the Secretary of the Interior after the grants respectively have been adjusted; and patents of the United States shall issue therefor, and shall relate back to the date of the original certification or patenting, and the Secretary of the Interior, on behalf of the United States, shall demand payment from the company, which has so disposed of such lands of an amount equal to the government price of similar lands; and in case of neglect or refusal of such company to make payment as hereafter specified within ninety days after the demand shall have been made, the Attorney General shall cause suit to be brought against said company for the said amount: Provided, that nothing in this act shall prevent any purchaser of lands erroneously withdrawn, certified or patented as aforesaid from recovering the purchase money therefor from the grantee company, less the amount paid to the United States by such company as by this act required: And provided, that a mortgage or pledge of said lands by the company shall not be considered as a sale for the purchase of this act, nor shall this act be construed as a declaration of forfeiture of any portion of
61 any land grant for conditions broken, or as authorizing an entry for the same, or as a waiver of any rights that the United States may have on account of any breach of such conditions.

SEC. 5. That where any said company shall have sold to citizens of the United States, or to persons who have declared their intention to become such citizens, as a part of its grant, lands not conveyed to or for the use of such company, said lands being the numbered sections prescribed in the grant, and being co-terminus with the constructed parts of said road, and where the lands so sold are for any reason excepted from the operation of the grant to said company, it shall be lawful for the bona fide purchaser thereof from said company to make payment to the United States for said lands at the ordinary government price for like lands, and thereupon patents shall issue therefor to the said bona fide purchaser, his heirs or assigns: Provided, that all lands shall be excepted from the provisions of this section which at the date of such sales were in the bona fide occupation of adverse claimants under the pre-emption or homestead laws of the United States, and whose claims and occupation have not

since been voluntarily abandoned as to which lands the said pre-emption and homestead claimants shall be permitted to perfect their proofs and entries and receive patents therefor; Provided further, that this section shall not apply to lands settled upon subsequent to the first day of December, eighteen hundred and eighty-two, by persons claiming to enter the same under the settlement laws of
62 the United States, as to which lands the parties claiming the same as aforesaid shall be entitled to prove up and enter as in other like cases.

SEC. 6. That where any such lands have been sold and conveyed as the property of any railroad company for the state and county taxes thereon, and the grant to such company has been thereafter forfeited, the purchaser thereof shall have the prior right which shall continue for one year from the approval of this act, and no longer, to purchase such lands from the United States at the government price, and patents for such lands shall thereupon issue. Provided, that said lands were not, previous to or at the time of the taking effect of such grant, in the possession of or subject to the right of any actual settler.

SEC. 7. That no more lands shall be certified or conveyed to any state or to any corporation or individual, for the benefit of either of the two companies herein mentioned, where it shall appear to the Secretary of the Interior that such transfers may create an excess over the quantity of lands to which said state, corporation or individual should be rightfully entitled.

Par. 27. That on January 15, 1887, an application was addressed to the Secretary of Interior on behalf of certain settlers in O'Brien and Dickinson counties, Iowa, referring to the land in controversy, and other lands not patented by the state to either the Milwaukee Company or the Sioux City Company, requesting that the Attorney General of the U. S. be asked to commence and prosecute a suit on behalf of the United States, asserting title in it to said land, and said application was duly heard by said Secretary of
63 Interior and on such hearing were heard counsel for said applicants and counsel for each of the said railroad companies, and said Secretary of the Interior duly decided the same, and reduced his decision to writing, in the form of a letter dated July 26, 1887, addressed to the Commissioner of the General Land Office, true copy of which is attached hereto as Exhibit "2."

Par. 28. That acting upon said decision and the order contained in said Exhibit "2" the Commissioner — General Land Office on August 11, 1887, sent to the Governor of Iowa a communication in regard thereto, true copy of which is attached as Exhibit "3."

Par. 29. That on January 11, 1888, the record and papers in said matter having been returned by the Commissioner of the General Land Office to the Secretary of the Interior, said Secretary sent to the Attorney General of the U. S. a communication relative to the commencement of a suit for the recovery of said lands, copy of which is attached hereto as Exhibit "4."

Par. 30. That on October 4th, 1889, the Attorney General of the U. S. brought an action for and on behalf of the United States as

plaintiff, against the Sioux City Company and others, defendants, in the Circuit Court of the U. S., for the Northern District of Iowa, Western Division, to recover the land in controversy and other lands aggregating 21,979.85 acres, under said act of March 3, 1887.

The bill of complaint therein was filed on Oct. 4, 1889, subpœna served on said company on Oct. 8, 1889, by serving one of its
64 directors in said district. The other defendants, viz., E. F. Drake and A. H. Wilder entered appearance on Nov. 4, 1889, without service of subpœna.

That neither said Ellen M. Childs nor the plaintiff herein nor John Fitzgerald, the tenant then in possession of said land, were made parties defendant to said action, and none of said parties were ever brought in as defendants therein.

Par. 31. That upon due proceedings had in said Circuit Court of the U. S., a decision was rendered therein on Oct. 20, 1890, in favor of complainant, the United States, and on December 18, 1890, a decree was entered therein quieting the title in the United States to the land in controversy, and to the other lands involved in said action.

Said decision is reported in 43 Federal 617.

Par. 32. That the said Sioux City Company perfected an appeal in said action to the Supreme Court of the U. S., and on Oct. 21, 1895, the said Supreme Court affirmed said decree referred to in the last paragraph, the decision of said Court in said action being reported in 159 U. S. 349.

The court discuss various contentions and then say: "It is apparent, therefore, that the fundamental question in the case is whether the Sioux City Company, having failed to complete the entire road from Sioux City to the Minnesota line, has received as many acres of the public lands as it could rightfully claim under the Act of 1864? If this question be answered in the affirmative, the company cannot complain of the final decree as one to the prejudice of its substantial rights. * * * Our conclusion, then, is
65 that the Sioux City Company, having failed to complete the entire road, for the construction of which Congress made the grant in question, was not entitled to the whole of the lands granted, but, at most only to one hundred odd numbered sections—as those sections were surveyed, whatever their quantity—for each section of ten consecutive miles constructed and certified by the governor of the state; and that, according to the measurement of 1887, which is accepted as the basis of calculation, the railroad company had, prior to the institution of this suit, received more lands, on account of the fifty miles of constructed road, certified by the governor, than it was entitled to receive. Under this view, it is unnecessary to inquire whether the particular lands here in dispute should not have been assigned to the company, rather than other lands containing a like number of acres that were, in fact, transferred to it, and which cannot now be recovered by the U. S. by reason of their having been disposed of by the company."

Par. 33. That on November 18, 1895, the Commissioner of the General Land Office, by letter approved by the Secretary of the In-

terior, directed the Register and Receiver of the U. S. Land Office at Des Moines, Iowa, to give notice of restoration to public entry of the lands embraced in said decree, copy of which said letter and order is attached to defendant's counter claim as Exhibit "A."

Par. 34. That complying with said order and instructions of the Commissioner of the General Land Office, said Register and Receiver duly fixed Feb. 27, 1896, as the date upon which said lands
66 would be restored to public entry, and as the date within ninety days prior to which claimants of said lands under the Act of Mar. 3, 1887, should give notice of their claims, and notice of the fixing of said time was duly given by said Register and Receiver.

Par. 35. That said Sioux City Company never constructed any more road than as heretofore stated herein, and never constructed its line between Le Mars and Sioux City.

Par. 36. That the State of Iowa never conferred nor attempted to confer upon any other company than the said Sioux City Company the benefits of the grant provided for in said Act of Congress of May 12, 1864, nor any part of said grant for the purpose of securing the completion of the said railroad, and the State of Iowa, itself never completed said road, nor attempted so to do.

Par. 37. That the land in controversy herein was never patented by the state of Iowa to the said Sioux City Company.

Par. 38. That during the year 1872 the said Sioux City Company erected in the city of Sioux City, Iowa, machine shops, depot and round house of the value and at a cost of $125,000, and that of the said sum, $30,000, was paid to said railroad company as the proceeds of certain special taxes which were voted and collected within the city of Sioux City, for the benefit of said company, under the laws of Iowa.

Par. 39. That in the year 1879 the said Sioux City Co. sold and conveyed to the St. Paul & Sioux City Railroad Company, its road bed, rolling stock, depots, depot grounds, franchises and
67 other property used in connection with the operation of its said railway. That in the year 1881 the said St. Paul & Sioux City Railroad Company sold and co-veyed all of the property and privileges so purchased by it from the Sioux City Co. to the Chicago, St. Paul, Minneapolis and Omaha Railroad Company, which still owns and operates the same. That upon its said purchase of said property the St. Paul & Sioux City Railroad Co. continued to operate said road in connection with its line theretofore built in the State of Minnesota, under the Acts of Congress as heretofore stated, and over the line controlled by the Illinois Central Railroad Co. from Le Mars to Sioux City, and leased by it, as a continuous line from St. Paul and Minneapolis to Sioux City and continued to do so until its sale of said property to the said Chicago, St. Paul, Minneapolis & Omaha Railroad Company, and after such sale the latter Company continued to so run and operate said road in the same manner, and is still so doing at this time.

Par. 40. That about August, 1887, the Commissioner of the General Land Office caused to be prepared a map purporting to

show a more accurate measur-ment of the conflicting limits of the marginal limits of said grant to said Sioux City Co.

Par. 41. That after the determination of the said suit between the Milwaukee Co. and the Sioux City Co. and after the partition of the lands between said companies in said action, the Sioux City Co. proceeded to sell and dispose of the lands allot-ed and set off to it in said partition proceeding, including about 21,000 acres thereof
68 which had not been patented by the State of Iowa to said railroad company, and the issuance of patents to which had been enjoined — the said action, the land in controversy herein being part thereof, and that during the time from the confirmation of said partition of said lands by said Court, until Oct. 4, 1889, when said suit was brought against said Company by the U. S., said Sioux City Co., in fact sold to private parties and individual purchasers the greater part of said lands so set off to it, and which had not been patented to it by the State.

Par. 42. That the said lands which had been so selected by the Sioux City Co., within the limits of its grant within O'Brien County, Iowa, and which had been patented by the United States to the State of Iowa, for the use and benefit of said Company as aforesaid, but which had not been patented by the State to the said railroad company, were, by the proper officials, duly assessed and listed for taxation and taxed as follows: That for the years 1873 to 1882, inclusive, they were assessed and taxed as the property of the said Sioux City Co.

But there was a question raised between the Milwaukee and Sioux City Companies and the County as to the propriety of said lands being taxed as they had so been, and in 1884, said controversy was settled by an agreement between the County and the said Companies, that the taxes for the years 1873 to 1882, inclusive, should be cancelled, and that the said Sioux City Company should pay taxes for the year 1883 and thereafter, and the said land in odd numbered sections in the over-lapping limits of said grants and within the limits of the said Sioux City grant were assessed
69 and taxed for the years 1883 to 1886, inclusive, some in the name of the said Sioux City Company, and others in the name of no person as owner, and for the year 1887, twelve pieces thereof were assessed and taxed to respective purchasers thereof from the said Sioux City Company, and the remainder thereof to the said Sioux City Company; that the said Sioux City Co. paid the taxes in full thereon for the years 1883, 1884, and 1885; said lands were sold for the taxes of 1886, at the tax sale of Dec. 5, 1887, and were redeemed by the said Sioux City Co., and the taxes thereon for the year 1887 were paid by the said Sioux City Co. on April 26, 1888. That from 1887 to 1896, said lands were assessed and taxed to either the Sioux City Co. or persons to whom it had sold respective parcels thereof, and where asses-ed to the Company, the taxes were paid by the Company, and where assessed to individuals, they were in some cases paid and in others defaulted, and where defaulted the lands were sold for taxes not paid, at the regular tax sales. That the land in controversy was assessed for the year 1888 in the name of the

Western Land Company, which was a corporation organized for the purpose of handling the Milwaukee land grant lands, was sold at the tax sale of December 2, 1889, which sale was cancelled by the Auditor of O'Brien County, Iowa, about the year 1902, under the provisions of Section 1452 of the Code of 1897. The land in controversy was sold at the regular tax sale for the taxes of 1889 and 1890, and the subsequent taxes for the years 1891, 1892 and 1893 were paid by the purchasers at such sales, and about the year
70 1901 the Treasurer was enjoined from executing tax deed to the purchaser, and the purchasers enjoined from applying for or accepting tax deeds thereunder. The taxes for the years 1894 to 1901 are not paid; the land was sold for the tax of 1902 at the tax sale of December, 1903; the tax for 1903 was paid by the defendant and the tax for 1904 has not been paid.

Par. 43. That after the passage of the Act of Congress of May 12, 1864, the United States at all times prior to the institution of the suit by it against the Sioux City Co. in Oct. 1889, treated the lands mentioned in said grant, including the land in controversy and all the lands, title to which was quieted in the United States as heretofore stated, as having passed under and by virtue of said grant to the State of Iowa, for the use and benefit of said Railroad Company. That after said certification of the construction of the said road by the Governor of Iowa, and prior to Oct. 4, 1889, said Railroad Company handled and sold said lands, collected from purchasers the purchase money therefor, and exercised all acts of ownership over the same, putting sales agents in the field to sell the same, maintaining suit in the United States Court in partition against the Milwaukee Co., involving said lands, and in said suit claiming it was the owner thereof and obtaining a decree in said U. S. Circuit Court for the District of Iowa, that said land belonged to said Sioux City Co., said decree being at length, as heretofore stated; and having said lands involved therein partitioned and set off to said respective Companies in severalty; the land in controversy being set off
71 to said Sioux City Company, that said Sioux City Company, sold and disposed of said lands so set off to it in said suit, including the land in controversy, as owner thereof, and caused the same to be assessed for taxation in the usual manner as the lands of the said Sioux City Co., and the same were so assessed; and the said Sioux City Company and this plaintiff, and those under whom he claims, paid taxes thereon from year to year as owners thereof, and said U. S. Government did not prevent nor take any steps to prevent nor interfere with the doing of any of said things set forth above in this paragraph, until it brought its said action in Oct., 1889. That during all the period after the passage of the acts of the legislature of Iowa of 1882 and 1884, as heretofore stated, and prior to said Feb. 27, 1896, many and divers individuals applied at the local land office where the said lands were situated to enter the same under the homestead laws of the U. S., they being qualified to make such entry, and said applications were in each instance refused, and the department failed to recognize the same, and stated as reason therefor, that the said lands were within the limits of said grant of

May 12, 1864, and not subject to entry. And that the Commissioner of the General Land office and the Secretary of Interior upon being applied to during said time for information in regard to the status of said lands by various parties, replied in each instance, that said lands were embraced within the said grant of May 12, 1864, and not subject to entry.

Par. 43A. That the United States after the passage of said Act of May 12, 1864, did no acts and took no steps recognizing
72 or claiming the said lands as belonging to the United States, until the commencement by its of said action in Oct., 1889.

Par. 43B. That after the termination of said action quieting title to said lands in the United States, the Government through its proper officials, placed said lands for disposal and opened the same to entry through said order of Commissioner of the General Land Office. Exhibit "A" Def't's Counter Claim.

Par. 44. That after the rendition of the decree in 1895, quieting title in the United States to the lands in O'Brien County, aggregating 21,000 acres, and including the tract in controversy, and after said land had been opened to entry, a large number of contests arose before the U. S. Land Department, between homestead applicants for said lands and persons claiming under said Act of Congress of Mar. 3, 1887, as purchasers thereof, from the said Sioux City Co., and in said contests the said department of the Interior of the U. S. and all of its officers, including the various Registers and Receivers of the Land Office at Des Moines, Iowa, before whom such matters came, and the various Commissioners of the General Land Office, before whom such matters came, and the various Secretaries of the Interior before whom such matters came, all held that said Act of March 3d, 1887, applied thereto, and determined each case so arising before them upon its individual merits under the provisions of said Act of 1887, and applied said Act and its provisions to each of said cases.

Par. 45. That in the said suit of the U. S. against the Sioux City Co., in which decree was finally entered quieting the title
73 of the United States in the said 21,000 acres of land, the United States alleged and maintained in both the Circuit Court and the Supreme Court, that the Act of Congress of March 3, 1887, applied to the said lands in controversy therein, and to said grant of May 12, 1864.

Par. 46. That on Sept. 11, 1888, one Ellen M. Childs purchased the land in controversy from the Sioux City Co., for the sum of $1,270.64 to be paid upon the terms set forth in the contract attached to defendant's answer and counter-claim, as Exhibit "B," and said Exhibit "B" is a correct copy of the contract entered into between said Ellen M. Childs and the said Railroad Company in relation thereto. That at the time of said purchase she paid said Railroad Company the $88.00 cash payment called for in said contract; that she made no further payment under said contract.

That at the time she so purchased said land the same was in the actual possession of Fitzgerald as tenant of the Sioux City Co., that said Company's possession through said tenant was undisturbed and

undisputed, and said Company sold said land to said Ellen M. Childs as a part of the grant under said Act of Congress of May 12, 1864, delivered possession thereof to her through the possession of its tenant, said Fitzgerald, and she continued in the uninterrupted and undisturbed possession thereof, through said tenant until October 8, 1889, at which time she sold said property to plaintiff, this agreement not to be construed to admit the rightfulness of said possession.

Par. 47. That on October 8, 1889, said Ellen M. Childs
74 sold the property in controversy to the plaintiff for the sum of $228, subject to the balance then remaining unpaid to the Railroad Company under said contract, and plaintiff thereupon then paid said Ellen M. Childs said $228 in cash, and said Ellen M. Childs and husband, duly executed and delivered to him an assignment of said contract, same shown as an endorsement on back of Exhibit "B" to defendant's counter-claim, and it is agreed that same is a true copy of such endorsement.

Par. 48. That during the year 1887 one Thomas Weir, built a small house upon the S. ½ N. W. ¼ of said Section 17, moved into the house with his family, and cultivated part of the land. That on April 1, 1888, defendant purchased from said Thomas Weir, under an oral contract his said house and improvements and rights in said land for the sum of $50.00 and moved into said house on April 1, 1888, with his family, and has continued to reside therein with his family, from said date to the present time. That shortly after April 1, 1888, defendant moved said house to a point on said S. ½ N. W. ¼ said Section 17, near the southwest corner of said land, nearer to the road which runs North and South past the West end of said property than it was when he purchased same, and has resided in said house at said location ever since. That he repaired and improved said house and built a stable near the same in the spring of 1888. That he farmed the said S. ½ N. W. ¼ of Section 17 and has continued to so farm and use and enjoy the same from said time until the present.

Par. 49. That on or about the first day of May, 1890, the
75 defendant with a gang of men and teams went on to the land in controversy and broke up that part of it which had not theretofore been broken, except about fifteen acres, and cropped the same, and had been so in possession thereof for more than thirty days before the plaintiff herein learned that he had so taken possession thereof, and defendant has ever since said time continued to farm the property in controversy therein.

Par. 50. That from the time said defendant moved upon the said S. ½ N. W. ¼ Sec. 17, on April 1, 1888, until the time he so took possession of the property in controversy as stated in the last paragraph, he had no possession or use or occupancy of said premises in controversy, except to sow certain oats thereon and attempt to harvest the same, in 1888, as specifically set forth below herein: That defendant herein at no time has lived upon, nor had any buildings upon the property in controversy, nor enclosed the same by fence.

except that part of the land that is used for pasture, being about 20 acres, and being partly on both the North and South Eighties.

Par. 51. The land in controversy was wholly vacant, unoccupied, unimproved and wild prairie, prior to 1884. One Beerbower then broke two or three furrows around the entire half section, but did not reside on the land, and is not known to have made any claim to it. During the same year one Peterson broke about five acres along the South line of the land in controversy, but left during the same year and made no claim to the land.

During the same year one Fitzgerald who was then living
76 upon the S. W. ¼ of Section 8 in the same township, broke six or seven acres in the northwest corner of the land in controversy, and in 1885 cropped that part of the land in controversy which was broken up, and continued from that time until the spring of 1890 in the uninterrupted and undisturbed possession of the land in controversy except as follows:

In the spring of 1888, defendant took several teams and without the consent of said Fitzgerald went on to some of the breaking upon the land in controversy, and sowed five or six acres thereof *to* oats. That thereafter defendant attempted to harvest said oats, but possession thereof was taken by said Fitzgerald, and thereupon defendant brought suit against said Fitzgerald for said oats and for possession of the land in controversy, and said action was decided in favor of said Fitzgerald, and he retained both said crop and possession of said land.

Early in 1888 Fitzgerald entered into a written lease with the Sioux City Co. for the N. ½ N. W. ¼ of 17, and remained in possession thereof, during 1888, as tenant of the said Railroad Company thereunder, and in 1889 remained in possession thereof as tenant of said Ellen M. Childs.

Par. 52. That during the said ninety days prior to February 27, 1896, plaintiff duly published his notice of intention to make proof of his rights to said land under said Act of March 3, 1887, and on January 7, 1896, he filed with the Register and Receiver, his application, claiming the N. ½ of the N. ½ west of the Right of Way of Sec. 17-97-42, being the land in controversy, under Act of March 3, 1887.

Par. 53. That on February 27, 1896, defendant filed home-
77 stead application in the office of said Register and Receiver for the N. W. ¼ of said Section 17, including the land in controversy, except Lot 3. That a hearing was ordered between said parties to be held before the Register and Receiver on May 13, 1896, and due notice of said hearing given and said hearing was had at said time.

Par. 54. That on April 23, 1897, said Register and Receiver decided said contest, and a true copy of their decision is attached as Exhibit "C" to defendant's counter-claim.

Par. 55. That said contest and the decision thereon was taken by appeal to the Commissioner of the General Land Office, and on August 12, 1899, he decided the same, and a true copy of his decision is attached as Exhibit "D" to defendant's counter-claim.

Par. 56. That the contest and the said Commissioner's decision therein, were duly taken on appeal to Secretary of the Interior, and on August 10, 1900, he decided the same, reversing the decision of said Commissioner, and rejecting the homestead application of defendant, and awarding patent to land in controversy to plaintiff.

Par. 57. That thereupon plaintiff paid to the United States the Government price of $2.50 per acre for said land, $88.00 being paid by said Sioux City Co. the Government collecting said amount from said Co., and remainder being paid in cash by plaintiff, and patent was duly issued to plaintiff for said land, which patent was dated May 27, 1901, and was duly recorded in the office of the Recorder of O'Brien County, Iowa, on August 8, 1901, in Book 38 of
78 Deeds, page 273. That no part of said Government price has been repaid or offered to be repaid by the United States to plaintiff.

Par. 58. That at the time of the sale of the land in controversy to said Ellen M. Childs, and of the purchase thereof by plaintiff from her, said land was not in the bona fide occupancy of any adverse claimant, under the pre-emption, homestead or other settlement laws of the United States, and that the same had not been settled upon at any time subsequent to Dec. 1, 1882, and prior to the purchase thereof by said Ellen M. Childs, by any person or persons claiming right to enter the same under the settlement laws of the United States.

That said Ellen M. Childs and this plaintiff were at said times, and have ever since been citizens of the United States.

Par. 59. That at the time of the purchase of said land from the Railroad Company by Ellen M. Childs and of her sale thereof to plaintiff, the record title thereto, as shown by the records in the office of the Recorder of O'Brien County, Iowa, was as stated in Paragraph No. 28 of plaintiff's reply herein, and instruments were recorded on date therein shown.

That the following is a copy of the patent from the United States to the State of Iowa, referred to therein and herein

The United States of America to all to whom these presents shall come, Greeting:

Whereas by Act of Congress approved May 12, 1864, en-
79 titled (Full title.) Every alternate section of land, designated by odd numbers for ten sections in width on each side of said road;

And whereas it is further enacted that "in case it shall appear that the United States have, when the line or route of said road is definitely located, sold any section or any part thereof granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same, then so much land in alternate sections or parts of sections designated by odd numbers, as shall be equal to such parts as the United States have sold, reserved, or otherwise appropriated, or to which the right of homestead or pre-emption has attached, shall be held by the State of Iowa for the uses and purposes aforesaid; provided, that the lands so selected shall in no case be located more than twenty miles from the line of said road."

And whereas, there has been filed in this office, through the Secretary of the Interior, under dates of July 26th, and August 10th, 1872, and February 10, 1873, evidence of the completion of the first, second, third, fourth and fifth sections of ten miles each of the Sioux City & St. Paul Railroad from the South line of the State of Minnesota, southerly to a point in section 16, township 92, range 45, making in all fifty continuous miles of said road;

And whereas, the sections and parts of sections of land inuring to the State of Iowa in aid of the construction of the Sioux City & St. Paul Railroad for the said fifty miles of road, have been selected and reported to this office in accordance with the acts and the rules and regulations of the General Land Office, as shown by the
80 original lists of selections dated August 1, 1872, and February 25th, 1873, and certified under dates of August 1st, 1872, and March 5th, 1873, by the Register and Receiver at Sioux City, Iowa, the said tracts being described as follows, to wit: (Description of land in controversy and other lands.)

Now know ye, that the United States of America, in consideration of the premises and pursuant to the said Act of Congress, have given and granted and by these presents do give and grant unto the said State of Iowa, for the use and benefit of the Sioux City & St. Paul Railroad Company, of said State and its assigns, the tracts of lands selected as aforesaid and described in the foregoing;

To have and to hold the said tracts, with the appurtenances, unto said state for the use and benefit of said Sioux City & St. Paul Railroad Company and its assigns forever.

In testimony whereof, etc., (Duly signed by U. S. Grant, President of U. S., and Eugene A. Fiske, acting recorder of General Land Office, under date June 17, 1873. Seal of General Land Office Affixed.)

Par. 60. That after the purchase by plaintiff from Ellen M. Childs of said land, an agreement was entered into in writing between plaintiff and the Sioux City Co., extending the time of payment on the unpaid payments under the contract for the sale of said land until ninety days after a decision should be filed by the Supreme Court of the United States in said case of the United States against said Railroad Company, brought in Oct., 1889.

Par. 61. That Lot No. 3 of Section 17 of the property in controversy herein, is that part of the N. E. $\frac{1}{4}$ of said Section 17,
81 lying west of the Right of Way of the Railway, and containing 6.63 acres.

Par. 62. That at the time Defendant entered upon the property in controversy and broke up the same in the spring of 1890, he knew that the same was in the possession of John Fitzgerald who had been the tenant thereon, and had farmed and cultivated same during the year 1889, as tenant of said Ellen M. Childs; that said Ellen M. Childs had sold said land to plaintiff in Oct., 1889, Fitzgerald becoming thereupon the tenant of plaintiff and moving off the land in March, 1890; that said land was claimed and had for many years been claimed by said Sioux City Co., as and for a part

of its grant; that said land had been declared to belong to said Sioux City Co. by the U. S. Court in the case between said Company and the Milwaukee Co.; that in said suit same had been set off to said Sioux City Co. as its property; that said company had for many years claimed that it had earned said land and was entitled thereto; that at that time and for many years prior thereto the officers of the Land Department of the U. S. had refused to recognize applications to file thereon under the homestead laws; and that said officials claimed that said land and other lands of its class, were not subject to entry for reasons heretofore stated.

Par. 63. That the land in controversy lies about twenty-two miles distant from the point on the south line of Minnesota, where the construction of said road was begun, measured along said road as actually constructed. (See map, Exhibit "I.")

Par. 64. That of the lands patented to the State for the
82 use and benefit of the Sioux City Company, amounting to 407,870.21 acres, as set forth in Par. 16 hereof, the State certified to the Sioux City Co. 322,412.81 acres, leaving in the State 85,457.40 acres. Of this amount, the Governor of Iowa, on January 12th, 1887, reconveyed to the United States, as directed by said Act of the General Assembly, approved March 27, 1884, (See Par. 25 hereof) 26,017.33 acres. That in 1886 the Sioux City Co., conveyed to the Milwaukee Co. 11,687.52 acres as directed by the decree in the case of the Milwaukee Co., vs. Sioux City Co., heretofore referred to, from the lands so patented to it by the State as aforesaid, and the State of Iowa conveyed to the said Milwaukee Co. 37,749.89 acres of the said unpatented lands in accordance with the findings of the decree in the said case of the Milwaukee Company vs. the Sioux City Company. That after making the said conveyance, there remained in the State 21,692.18 acres, same being the land decreed to the United States in said action by the U. S. vs. Sioux City Co., and restored to settlement and entry by order of Commissioner of General Land Office, Nov. 18, 1895.

Par. 65. That prior to the decision of the case of Knepper vs. Sands by the Supreme Court of the U. S., on May 31, 1904, and subsequent to the decision of the Supreme Court of U. S. in the case of the U. S. vs. Sioux City Co., in Oct., 1895, by which title was quieted in the United States to said 21,000 acres of land, as heretofore stated, there had been no decisions by any United States Court involving any of said lands, nor the rights of claimants thereto,
nor construing the law in reference to the application of the
83 Act of March 3, 1887, thereto, except only the cases of Linksweiler vs. Schneider, decided on July 3, 1899, and reported in 95 Fed. 203, and the case of Tow vs. Manley, decided on Sept. 6, 1901, and reported in 110 Fed., 241; the case of Benner vs. Lane, decided June 30, 1902, and reported in 116 Fed. 407; the case of Brett vs. Meisterling, decided Sept. 3rd, 1902, and reported in 117 Fed., 768, and the case of Sands vs. Knepper, decided Sept. 6, 1901, and not officially reported. That all of the said cases were decided by the U. S. Circuit Court for the Northern District of Iowa, and said Court in each of said cases recognized, considered and con-

strued the law to be that the said grant of May 12, 1864, had not been adjusted at the time of the passage of said Act of Congress of March 3, 1887, and recognized and construed said Act of March 3, 1887, as applying to said lands, and recognized, considered and construed the law to be that one could be a good faith purchaser of said lands from the said Sioux City Co., under the facts as existing in relation to said lands, and within the meaning of said Act of March 3, 1887, and decided each of said cases upon its merits under the law as so construed and considered by them; the said cases of Linksweiler vs. Schneider and Brett vs. Meisterling, being decided in favor of the purchaser from said Company, claiming under said Act of 1887, as good faith purchasers, and the remainder of said cases being decided in favor of homestead claimants, as against purchasing claimants, claiming under said Act of 1887.

Par. 66. That the United States after the passage of said
84 Act of May 12, 1864, did no act and took no steps to change the showing of the record title as to said lands, the title to which was ultimately quieted in the United States as heretofore stated, nor to give notice to the public, or those dealing with the Sioux City Co. in regard thereto, upon said official records or otherwise, that it claimed said lands as belonging to the United States, until the commencement of its said action in October, 1889.

Par. 67. That prior to October 4, 1889, said Sioux City Company had sold practically all of said lands, title to which was ultimately quieted in the United States as aforesaid, and the purchasers of a large part thereof had entered upon and improved same by breaking out and cultivating them, and in many cases by erecting buildings and fences and planting groves and otherwise improving the same. And said purchasers from said Company caused the lands so purchased by them to be assessed and taxed as their property, and a large part of said purchasers paid the taxes so assessed against said lands and where they failed to pay, the said lands were sold by the County Treasurer at the regular tax sales; and the United States did not prevent nor take any steps to prevent nor interfere with the doing of any of said things, nor to give notice that it claimed said lands, until it brought its action in October, 1889.

Par. 68. That no payment was made upon the contract or purchase from the Sioux City & St. Paul Railroad Company, except the payment of $88, made by Ellen M. Childs as set forth in Par. 46 hereof.

Par. 69. That plaintiff in the hearing before the Register
85 and Receiver of the U. S. Land Office in the contest between him and defendant over the land in controversy herein testified as follows:

The Company made no demand on me for payments due under the contract after the date of my purchase. I have not paid any taxes on the land. I had an understanding with the Company that on account of our not being able to get possession of the lands that they would be lenient in the payments and that we would be protected in these lands and that they would pay the taxes and that the tax titles should not get into possession of outside parties. This

conversation with reference to these taxes was with O. M. Barrett. He was looking after the taxes at that time. I think he paid them for the Company. He bid off the taxes for one year or more.

Cross-examination:

Mrs. Childs represented that she was in possession of the land when I bought the contract. I saw the land prior to 1888 and 1889. John Fitzgerald was in possession. I bought it in the fall of 1889 and did not know that there was anyone else had a claim to the land until May, 1890. That was the first time I know anyone else had any claim adverse to mine. The time to break it was about May 10. There was about fifteen acres broken by John Fitzgerald. In the spring of 1890 I made arrangements with Peterson to break that out, but I found that Davis went on with a gang of men as soon as the frost was out, and went to breaking it. I found that he was on it thirty days before I knew it. Had his teams on there and had the prairie broken up.

86 Par. 70. It is agreed that the reasonable value of the land in controversy with a good title in Sept., 1888, was $14.67 per acre; in February, 1896, was $15.00 per acre; In July, 1901, was $65.00 per acre and at present time is $90.00 per acre.

(The foregoing is duly signed by attorneys for both plaintiff and defendant, dated Sept. 10, 1906, and filed in this cause Sept. 28, 1906.)

EXHIBIT "1" TO STIPULATION OF FACTS.

This is a map of the entire railroad grant in question herein, which it is impossible to abstract; it has accordingly been duly stipulated between the parties hereto that no attempt need be made to abstract the same, and that the original of such map, used in the trial and being a part of the record herein below, shall be certified by the clerk of the O'Brien District Court to this Court for use in the trial and determination of this case, and it will be so done.

EXHIBIT "2" TO STIPULATION OF FACTS.

Letter of L. Q. C. Lamar, Secretary of the Interior, to Commissioner of Gen. Land Office, dated July 26, 1887, embracing his decision on application of settlers of O'Brien County for the commencement by the U. S. of suit to assert title to about 55,000 acres of land in said county involved in the grant of May 12, 1864, and his instructions to the Commissioner to proceed to adjust said grant under the Act of Mar. 3, 1887. It recites: The making of said application; the passage and provisions of the Act of May 12, 1864; the various Acts of the Legislature of Iowa referring to said grant, including the Acts of 1866, 1868, 1874, 1882 and 1884; the

87 acceptance of the grant by the Sioux City Co.; the filing of map of definite location; acceptance thereof by Interior Department; withdrawal from market of lands within ten and twenty mile limits; and construction of the road from Minn. line to Le

Mars; certification by the Governor of the completion of the five ten mile sections; the patenting of lands to the state and the acreage patented at different times, the same as shown by the foregoing stipulation of facts; the suit between the Sioux City and Milwaukee Companies, and the holding of the Supreme Court of the U. S. therein under date of Mar. 29, 1886, (117 U. S. 406) holding that the lands in the common granted and common indemnity limits should be awarded an undivided half to each Company; that "the effect of the decree (in above case) was to dispose of the 189,595.24 acres, by awarding to the Sioux City Co. 110,159.94 acres and to the Milwaukee Co., 79,435.11 acres;" the patenting of the lands to the Milwaukee Co. conforming to this decree; the quantity certified by the State to the Sioux City Co.; a lengthy computation showing the disposal of all of the lands patented to the State by the U. S., and that of these the State still retained 21,692.18 acres. He holds that the Sioux City Co. is entitled to lands for the five ten mile sections of constructed road but none for the last 6¼ miles into Le Mars; and that neither the Sioux City nor the Milwaukee Company is entitled to indemnity for the lands each lost to the other in the over-lapping limits under the above decision; that the Sioux City Co. has earned under the grant 281,827.17 acres, and that it had received 280,725.29 acres, leaving still due to it 1,101.88
88 acres; that the difference between this amount still due the Company and the 21,692.18 acres still held by the State, 17,590.30 acres, he concludes the U. S. is entitled to, and that suit should be brought therefor, if necessary. He closes with the following instructions to the Commissioner:

"You will please complete the adjustment of the grant in accordance with the views herein expressed and make demands in compliance with the requirements of Section 2 of the Act of March 3, 1887, (24 Stat. 556) upon the Sioux City & St. Paul Railroad Company, and upon the State of Iowa, for the relinquishment and reconveyance to the United States of the 17,590.30 acres above referred to, or such quantity as the completed adjustment in accordance with principles herein enunciated, may show to be wrongly held by the state under patents from the United States.

If relinquishment and reconveyance be made, you will return the case to this Department with your report thereon, for further action; if there be neglect or failure to so reconvey within ninety days after demand, as aforesaid, you will promptly report the fact to this Department and return the record in order that the Attorney General may be requested to institute suit for the recovery of the lands in question."

EXHIBIT "3" TO STIPULATION OF FACTS.

This is a letter written by Commissioner of the General Land Office to the Governor of Iowa, dated Aug. 11, 1887, in which he recites that he incloses copy of the decision of the Sec. of the Interior
of July 26, 1887, (Exhibit "2" above) that upon examina-
89 tion it is found that the total amount which could be earned by the Sioux City Co., under its present construction, is

279,427.16 acres instead of 284,827.17 acres, as found by the Commissioner, and that, therefore, there had been an excess of 788.13 acres patented to the Company. He then says: "Upon a complete and final adjustment of the grant, which cannot be made until certain questions affecting the right of indemnity selections are determined, a further excess may be found, and if so, the proper steps will be taken to recover it * * * as directed by the Sec'y of the Interior you are hereby requested to reconvey to the United States this 21,692.18 acres."

EXHIBIT "4" TO STIPULATION OF FACTS.

This is a letter from acting Sec. of Interior to Att'y Gen. of the U. S., dated Jan. 11, 1888. It is entitled "Railroad Grant suit to recover title, Act of Mar. 3, 1887. Sioux City & St. Paul R. R. Co." It recites the application of Jan., 1887, by the O'Brien County settlers; the decision of the Secretary thereon July 26, 1887, copy of which is enclosed; that "the Commissioner of the General Land Office was directed to complete the adjustment of the grant in accordance with the views expressed in said departmental decision, and to make demand in compliance with section two of the Act of March 3, 1887 (24 Stat. 556) upon the Sioux City & St. Paul Railroad Company and upon the State of Iowa for the excess found by the adjustment to be wrongfully held under patents from the United States. The Commissioner was further directed to make report to this Department whether the company and State did or did
90 not relinquish and reconvey with a view, in case of neglect or failure to so reconvey of requesting you to institute suit for the recovery of the lands wrongly held. That report dated Jan. 7, 1888, has been made and is now before me. It sets out that the adjustment shows 21,692.18 acres of unearned lands held by the State under patents from the United States for the benefit of the Sioux City Company, and 788.13 acres which have been by the State passed to the company, in excess of the amount earned; also that there has been a failure on the part of the company and of the State to reconvey as requested. * * * I have now the honor to forward to you said report together with accompanying papers and exhibits, and to request that suit be instituted in the proper court in the name of the United States, with a view to having title to the lands referred to herein and in departmental decision of July 26, 1887, as unearned by the Sioux City & St. Paul Railroad Company declared in the United States, if after examination and consideration you deem such suit advisable."

On said trial no objection was made to any of the foregoing evidence.

Plaintiff further offered in evidence

Testimony of Scott Logan,

duly taken by deposition, and duly certified and filed herein on Sept. 28, 1906, under stipulation which provided that in taking

this testimony the attorney for the defense does not waive any objection he may have to the introduction of the evidence taken in the deposition except matters covered by this stipulation as to manner, form and time of taking testimony, and insists that no
91 additional evidence can properly be taken to be read upon the trial for the reason that the only competent evidence is the testimony which was taken before the register and receiver, especially in view of the fact that no objection is made to the form or character of that evidence, and no allegation that there was any mistake, fraud or collusion in taking the same.

Direct examination:

Am plaintiff herein; I resided in Sheldon some time prior to purchasing land in controversy; had heard of the litigation in the U. S. Court between the Milwaukee and Sioux City companies; came to Sheldon in 1880, and these lands at that time were all vacant, and I made inquiry from everyone that I thought would know anything about it and learned that they were claimed by the two roads that cross here, and were called over-lapping lands, and that I would have to wait until it was settled in the courts between the roads before I could buy. This was common talk and common knowledge around Sheldon from 1880 to 1889. I knew the outcome of that suit. There was a big lot of these lands about Sheldon; I knew of some of them being occupied in what was called "squatters rights;" my understanding as to "squatters rights" was that they were simply holding the lands and using them until the settlement was made in court between the two roads so that the lands could be sold. I had talked with several parties who had tried to enter these lands as homesteads; they told me that their applications had been refused continuously on the ground that they were not open to
92 entry as homestead lands were within the railroad limits. I knew of the railroad company paying taxes on these lands, of its having an agent in the field to sell them, of its collecting the purchase price therefor; this was all prior to my purchase. John Fitzgerald broke a few acres on this eighty and had possession of it for two or three years without any lease; then decision of court came out that all lands had been amicably settled between the companies, and at that time he took lease from the Sioux City Co. to continue occupation of this land, and was occupying it under that kind of a lease when Mrs. Childs bought it, and was still in occupancy at time I bought. In presenting my claim before Land Office to this land under the Government's proclamation opening it up to entry, I incurred expense in witnesses and going there of about $100; none of this expense has ever been repaid; I made application within the three months allowed; did not prove up until afterwards; prior to the time that I proved up and incurred this expense, and also prior to paying the government price of $2.50, I learned of decisions of Land Department recognizing rights of contract holders; "I learned that these decisions were governed by Act of Congress passed in 1887, giving purchasers who were innocent purchasers preference over squatter claimants." At time of purchase

I had no notice or knowledge of any kind that anyone else than Mrs. Childs claimed title to the land; I was under the impression fully that there was no claimant; I believed that I would get good title under the purchase; when I made my application at the Land
93 Office at Des Moines and incurred the expense testified to and paid the government price, I did not think there was a question of a doubt but that I was a good faith purchaser under the Act of 1887.

Q. State whether or not the facts that you have recited in the testimony as to the proclamation of the Government inviting the presentation of contract claims decision of the department in the other cases and the other facts testified to by you, were relied upon by you in incurring the expense and paying the government price.

A. They were entirely.

(Objected to by defendant as leading and suggestive.)

I knew that this road had been built from the state line to Le Mars and had been over it; I understood that the railroad was entitled under the grant to 100 sections for every ten miles; that the width of the grant on each side of the road was ten miles. At the time I purchased, I had no knowledge of the amount that had been patented or awarded to the railroad company, or of any lands having been given to the company outside of the ten mile limits, or of any other facts or circumstances that would prevent or make it inequitable for the railroad company to claim these lands from the government.

I paid the fair and reasonable value of land in controversy when I purchased. I was acquainted with the market value at that time.

Cross-examination:

My occupation is milling; engaged in it quite extensively;
94 am interested a little in lands, and a little in banking; I bought four pieces of this land, three quarter sections; this is an odd piece, 87 acres; never undertook to take it as a homestead, never lived on it, never been in possession, and never made any effort to get possession of the land. Never read the Act of May 12, 1864; not familiar with the Act of the General Assembly of 1882, relating to unearned lands except common talk, heard they passed an act in 1882; did not inquire into it enough to understand it; I heard it talked and contradicted that the General Assembly of 1884 passed an act in which the lands were reconveyed to the U. S.; I heard different interpretations of it. My knowledge of the litigation between the Milwaukee and Sioux City companies and of the provisions of the grant of May 12, 1864, was simply common talk upon the street; knew only by hearsay what land was certified by the Governor to Department of Interior on road completed. I read the Act of Mar. 3, 1887; do not think I did so until some time in the '90's after I bought these lands; I did not understand that this act gave the railroad company the right to sell the lands, or that under it they acquired any additional rights to the lands; I understood that the U. S. brought suit against the railroad company to prove that they had not

earned it and that the decision of the U. S. Supreme Court was that it reverted back to the Government. "Then there was a provision made by Act of Congress touching all such lands that had been erroneously sold by the railroad company supposing that they had a right to sell it and had sold it to innocent purchasers, and that
95 the Act of Congress of 1887 was to dispose of such lands where innocent purchasers had bought." Do not know how many miles of road the company built only by hearsay; do not know the amount of lands they received or the amount of lands certified to the Milwaukee Co., or certified to the Sioux City Co. I suppose that the knowledge that I had in regard to these lands was hearsay; I do not think that I ever read any of the Acts except that of Mar. 3, 1887.

Q. You simply took it for granted that the railroad company had the right to sell this land and you bought it?

A. I asked my attorney. I think I asked every attorney in Sheldon, and I had a good many talks with Mr. Swain in Sioux City.

Redirect examination:

Reason I made no payments to the railroad company was that I was told not to by Mr. Barrett, attorney at Sheldon who represented the company at the time I purchased the lands; this was just after I purchased. He said that the company would pay my taxes and extend the time of payment—in fact I entered into an agreement with the Company that they would extend the time of payment, and they would pay my taxes. I think shortly after that the suit was begun, and while this was in litigation I was to make no payments.

Q. You testified that you were not in possession of the land at any time?

A. Yes.

Q. Well, if I understood your testimony on direct, you
96 mentioned something about a man Fitzgerald having possession at the time you bought it. You regarded Fitzgerald after the purchase by you as your tenant?

A. Yes.

Q. Now you testified that you made no effort to get possession. Why?

A. Well, suits pending along the same line had been adverse to my getting possession until the title was quieted.

Was waiting for the decision of prior cases which had been brought in Court.

On February 29, 1908, said Court entered herein the following

Decree.

This cause coming on to be heard this 29th day of February, 1908, upon the issues joined herein, and the Petition, Answer and Counterclaim, Reply to such Answer, and Answer to such Counter-claim, and the proofs, documentary and written, taken and filed in this cause, and the same having been duly argued by counsel, and the Court

being fully advised finds for the defendant on the issues joined in relation to the North Half (½) of the Northwest Quarter (¼) of Section Seventeen (17), Township Ninety-seven (97), Range Forty-two (42) West of the Fifth P. M., in O'Brien County, Iowa, and that defendant is entitled to the relief prayed for in his Answer and Counter-claim as to said land; and the Court finds in favor of plaintiff, on all issues as to Lot Three (3) involved herein, the same being that part of the Northeast Quarter (¼) of said Section Seventeen (17) lying west of the railroad right-of-way, and that plain-
97 tiff is entitled to the relief prayed for by him as to said Lot Three (3).

It is therefore, now ordered, adjudged and decreed that the title and estate of plaintiff, in and to said Lot Three (3), be, and the same is hereby established and quieted against the adverse claims of defendant, and defendant is hereby barred and forever estopped from having or claiming any right or title adverse to plaintiff or those claiming by or through him in and to said premises, and that plaintiff is entitled to the immediate possession of said premises, and it is ordered that Writ of Possession issue to place plaintiff in possession thereof accordingly.

It is further ordered, adjudged and decreed that the defendant is entitled to claim and hold the North Half (½) of the Northwest Quarter (¼), Section Seventeen, Township Ninety-seven, Range Forty-two in O'Brien County, Iowa, as a homestead, by him duly taken possession of in the year 1890 and occupied since that date, and by him entered in the United States Land Office at Des Moines, Iowa, February, 1896, and that the right and title of defendant to the said land is paramount and superior to the title claimed by the plaintiff, through a written contract of purchase made by Ellen M. Childs with the Sioux City Co., Sept. 11, 1888, and by her assigned in writing to plaintiff October 8, 1889; that it is therefore further adjudged and decreed that the confirmatory patent issued by the Land Department to the plaintiff, for said realty, based upon the purchase of said realty from the Sioux City Company, is hereby an-
98 nulled, cancelled and set aside, and adjudged to be of no effect as to said North Half of Northwest Quarter of said Section Seventeen, against the claim and title of defendant; and it is further adjudged and decreed that any and all title or right apparently vested in plaintiff, by virtue of said patent for the realty last above described, is held by plaintiff in trust for defendant herein, as the real owner of said realty, and said plaintiff is hereby directed and required, within a reasonable time, to execute and deliver to defendant, a proper deed or instrument in writing, duly acknowledged releasing to defendant all apparent title, held by him in said realty, and the defendant is further authorized to hereafter move the Court for such relief and orders as may become necessary to secure the transfer of the title to said realty to the defendant; jurisdiction over the case and over the plaintiff being retained for that purpose; and it is further adjudged and decreed that defendant have and recover from the plaintiff the costs hereof, taxed at $— and have execution therefor. To which rulings, orders and decree, the plaintiff duly excepts.

Certificate of Evidence.

On Aug. 20, 1908, and within the six months, as required by law, the Honorable David Mould, the judge before whom said cause was tried, duly certified that the foregoing evidence set out in this abstract constitutes and is all the evidence offered, adduced or introduced in the trial of said cause by either of the parties thereto, and all objections to said evidence, the rulings thereon, and exceptions thereto,
99 and ordered that said evidence with his said certificate be filed and made a part of the record in this cause, and said evidence together with his said certificate was duly filed in the office of the clerk of the District Court of O'Brien County, Iowa, on Aug. 25, 1908.

On Aug. 22, 1908, plaintiff duly perfected his appeal to the Supreme Court of Iowa in this cause from that part of the judgment and decree rendered in favor of defendant at the February, 1908, term thereof, on the 29th day of February, 1908, relating to and affecting the North Half (½) of the Northwest Quarter (¼) of Section Seventeen (17), Township Ninety-seven (97), Range Forty-two (42), West of the 5th P. M., in O'Brien County, Iowa, otherwise described as Lot Four (4) and the Northwest Quarter (¼) of the Northwest Quarter (¼) of said Section Seventeen (17), Township Ninety-seven (97), Range Forty-two (42), West of the 5th P. M. in O'Brien County, Iowa, also from that part of said judgment and decree adjudging the plaintiff to pay the costs of said action, by causing

Notice of Appeal

to be duly served on said day upon defendant and upon the clerk of the District Court of O'Brien County, Iowa, and said notice of appeal, with proof of such service endorsed thereon, was duly filed in the office of said clerk of the District Court of O'Brien County, Iowa, on August 25, 1908.

That plaintiff on said Aug. 25, 1908, duly filed his

Supersedeas Bond

in this case with the clerk of said O'Brien District Court, which said bond was duly approved by said clerk.

100 That this Abstract contains all the evidence offered, adduced or introduced upon the trial of this cause by any of the parties thereto, and all the objections to said evidence, the rulings thereon, and exceptions thereto.

W. P. BRIGGS,
Attorney for Appellant.

I hereby certify that the actual cost of printing the foregoing abstract was $75.75.

W. P. BRIGGS,
Attorney for Appellant.

101 Filed Mar. 18, 1910. B. W. Garrett, Clerk Supreme Court.

In the Supreme Court of Iowa, May Term, A. D. 1910. In Equity.

SCOTT LOGAN, Appellant,
vs.
W. R. DAVIS, Appellee.

Appeal from O'Brien County District Court.

Hon. David Mould, Judge.

W. P. Briggs, Attorney for Appellant.
M. B. Davis and E. J. Stason, Attorneys for Appellee.

Appellant's Petition for Rehearing.

(Original Opinion Herein Printed in 124 N. W. 808.)

Due, timely and legal service of the within Petition for Re-hearing is hereby acknowledged this — day of March, 1910.

——— ———,
Attorneys for Appellee.

102 The original opinion of this court herein is printed in 124 Northwestern Reporter, 808.

This Court's Misapprehension of Fact.

In deciding this case, this Court fell into an error of fact in considering that the modified contract was entered into by Logan with the Railroad Co. on Oct. 8, 1889, the very day he bought the land in controversy from Mrs. Childs, whereas, in fact, such modified contract was not entered into by him until March 13, 1894, more than four years after his purchase. (See abstract page 14, last four lines on page.)

This was vital to what the court finds is "the controlling question in this case," namely, whether appellant Logan was a purchaser in good faith within the meaning of the Act of March 3, 1887. This case was decided upon the ground of Logan's bad faith, not constructive but actual, and this was based upon the above error of fact which when corrected leaves no basis for the finding of bad faith in the record.

This is not a quibble nor an attempt to gain an advantage through an error or oversight in the printing, but relates to a vital fact which, in the view that this court takes of this case, is controlling as to the rights of the parties thereto, and which has never been questioned at any time or by anyone in this case.

The court was no doubt led into this error by the incorrect statement of the date of the modified contract which appears on page 9 of appellee's brief, but that the date as it there appears was an unintentional error, I think counsel for appellee will not question. The

103 abstract herein has not been denied, and if appellee's counsel does question the showing of the abstract in this regard, and so does in such a way as to be recognized by this court, it must amount to a denial of the abstract and appellant would in such event desire that a transcript be ordered and had of the part of the record involved.

Based on the fact that plaintiff Logan made this modified contract with the Company at the same time he bought the land from Mrs. Childs, this court holds that "when plaintiff took an assignment of the Childs contract he knew of the suit that had been brought by the U. S. to quiet its title to the unearned and unpatented lands and that the land in controversy was included therein." This would be an undeniable conclusion, if the modified agreement had been made at that time, but is wholly contrary to the truth, as in fact disclosed by this record. Plaintiff testifies (Abst. 92 bot.) that he had no knowledge or notice of any kind that anyone aside from Mrs. Childs claimed the land. This is not attempted to be denied nor controverted. It is apparent also that he had no knowledge of this suit at the time he bought from the further fact that he paid the full value of the land (Abst. 93), which no man would do with knowledge that there was a suit pending involving its title. The bill in the suit by the United States to recover this land was filed October 4, 1889, but subpœna was not served upon the Company until Oct. 8, 1889 (Abst. 63) the day Logan bought and then upon a director of the Company within the Northern District of Iowa. In the nature of things, the railroad company could not have gotten around to make a modified contract such as in this case on the very day the subpœna was served, and this particularly in view of the well known fact that its principal officers resided at St. Paul,

104 Minn., and that its offices were maintained there. Further, no man would have purchased the land at any price with a knowledge that suit was pending involving it as to which he had no greater knowledge than could have been acquired by him within such brief time. He had no constructive notice as the suit was brought in the U. S. Court for the Northern District of Iowa, Western Division, which does not sit in the county where the land in controversy is located, O'Brien, but constructive notice, if there was such, would be immaterial on the question of good faith under this law. See the following authorities cited in original argument:

U. S. v. So. Pac. Co., 98 Fed. 45 (C. C. A. 9 Cir.)
U. S. v. Winona Co., 165 U. S. 463 (41 L. Ed. 789.)
U. S. v. So. Pac. Co., 76 Fed. 134-8.

That Logan had made diligent inquiry of those likely to know; had consulted with several attorneys; knew the facts as to the construction of the road and location of this land; and believed that the Company had the right to sell (Abst. 92-93-95) is nowhere controverted in this record, and it affirmatively appears that he made more careful investigation than men usually do.

The equitable estoppel claimed by plaintiff is against the assertion that the Act of Mar. 3, 1887, did not apply to these lands and is based not on the acts of the judicial officers of the government in

permitting him to press his claim as a contract purchaser but on acts of the executive and administrative officers in so dealing with the lands as to hold out the fact that the grant was unadjusted at the time of the passage of the Act of Mar. 3, 1887, and that said act applied thereto. Plaintiff relied upon these acts and he did
105 not have equal knowledge or means of knowledge with the government of the facts regarding these matters nor knowledge of any facts except those inevitably leading to the conclusion that the grant was unadjusted and the Act of 1887 applicable.

The facts of which he must have had knowledge or equal means of knowledge with the government to prevent the estoppel are those ultimately established in the suit by the U. S. to recover the lands, viz., that the Company, after in fact earning the land in controversy, had received from the government other lands equalling its total earnings and had sold the same. These are the facts and the only facts which would have shown the grant adjusted and the Act of 1887 inapplicable. There is not a syllable of evidence in this record to show that Logan had any knowledge of these facts, he specifically denies such knowledge (Abst. 93), and it is self evident that he did not have equal means of knowledge with the government thereof.

The more prominent acts of the government officials upon which the estoppel is claimed are the efforts of the Sec. of the Interior and the Commissioner of the General Land Office during 1887 and 1888 and after the passage of the Act of 1887 to adjust the grant, the suit by the U. S. to recover the land brought under the Act of 1887, and specifically alleging that said act was applicable and the order in 1895 of the Commissioner approved by the Sec. of the Interior, opening said lands for entry and for disposal under said Act of 1887. The doing of these things by any private individual or corporation would have stopped them from denying that the Act
106 of 1887 was applicable and the long line of authorities cited in appellant's original brief held that the same rule was applicable to the U. S. and a number of them applied it in land matters where the basis was the action of the same class of public officials as in case at bar.

The writer feels that but for the misapprehension of this court on the question of fact above referred to, which necessarily showed Logan's purchase to have been with the full knowledge of the government's claim, while the record conclusively shows the contrary, that this court would have reached a different conclusion in this case. It rejected the estoppel proposition on the ground of Logan's knowledge. Under the real facts as disclosed by the record, he had no notice, and if there was any question in the case as to the Act of 1877 applying, he would be entitled to the land under the Act of 1887. If defendant is estopped from claiming that said act does not apply, then Logan's rights are the same as though it did apply.

Plaintiff claims that he is not only so estopped by the equitable estoppel but also by the allegations of the U. S. in its suit to recover the land, the same being brought under the Act of 1887, and alleging that said grant was governed thereby.

State v. Taylor, 28 La. Ann. 460.
Folger v. Palmer, 35 La. Ann. 743.
Winn v. Strickland, 16 So. 606-12 Fla.

New Decisions on Trespass Proposition.

The U. S. Circuit Court of Appeals for the 8th Circuit has just decided two cases involving some of these identical O'Brien County contested lands, the history of which is the same as of that
107 involved herein, and where the circumstances of the particular cases are substantially similar to those in this case, and therein held against the homestead claimants on the ground of their trespass upon the prior possession of the claimants under the railroad contracts. These cases are:

Lyle v. Patterson, — Fed. ——.
Dockendorf v. Bassett, — Fed. ——.

These opinions were filed Feb. 21, 1910, and are not yet printed in the Federal Reporter. As soon as they are published, the writer will undertake to have the book and page inserted with pen. Quotations are from certified copies of these opinions. In both of these cases, the patentee had like plaintiff Logan, taken an assignment of contract of sale by the railroad company to other parties, and in both cases, the possession of the land by the patentees had been solely through tenants, said patentees, assignees of the contracts, having never at any time resided themselves personally upon the land. In the Lyle case, the court says:

"If it be assumed for the sake of the argument that Patterson was not entitled to acquire this land under the Congressional Act of Mar. 3, 1887, yet his possession was not mala fides. It was obtained and held under such a state of facts that no one but the United States could question his right thereto. Under such circumstances, complainant's entry upon the lands was that of a mere trespasser, and as such he acquired no rights under the homestead laws."

The court in said case, further says:

"That a party cannot initiate a right of homestead by settling upon land at the time in the actual possession of another, under a bona fide claim of right, is shown in the following cases: Hosmer v. Wallace, 97 U. S. 575; Quinby v. Conlan, 104, U. S. 42; Trenouth v. San Francisco, 100 U. S. 251; Clipper Mining Co. v. Eli Mining Land Co., 194 U. S. 220-231.

To maintain this action and obtain a decree from a court
108 of equity, awarding to him the title to the land in question, complainant must establish that he initiated such a right to the land, by settlement thereon, and offer to enter, as gave to him in equity a right to the land prior and paramount to the legal title of the defendants. Campbell v. Weyerhauser, 161 Fed. 332. In this we think he has signally failed."

The claim of Patterson, patentee, in the Lyle case was in no way other or different or more bona fide than the claim of Logan herein. Logan, like Patterson, paid full value for the land (Abst. 93, also 73 Par. 46-47; 86 Par. 70); had bought believing in good faith that he would get good title and that there was no one claiming title adverse to his grantor (Abst. 92); knew of the construction of the road; did not know of the company having received indemnity lands or any other fact or circumstance that would make it inequitable

for it to claim the land in controversy (Abst. 93), sought the advice of attorneys, had had no notice of the claim of any person other than Mrs. Childs from whom he bought (Abst. 92), and found her in the actual, undisturbed, notorious and open possession of the land (Abst. 73).

Defendant Davis, at the time of his entry upon the land in controversy, like Lyle in the other case, knew of the possession and occupancy of Logan and his grantor Childs through the tenant Fitzgerald, and of their claims to the land (Abst. 81, Par. 62). The case at bar is thus squarely within the rule laid down in the Lyle case.

In the Deckendorf case the court says:

"For the reasons stated, and under the authorities cited, in Lyle v. Patterson, et al., complainant's entry upon the lands then in the actual and open possession of the defendants, and his tender of his homestead filing and the fees to the United States Land Office, which were rejected, did not initiate such a claim to the land as entitles him to maintain this action."

169 Both of the above cases are directly in line with the decisions of the Supreme Court of the U. S.:

Atherton v. Fowler, 96 U. S. 513.
Hosmer v. Wallace, 97 U. S. 575.
Quimby v. Conlan, 104 U. S. 42.
Fremouth v. San Francisco, 106 U. S. 254.
Clipper Mining Co. v. Eli Mining Co., 194 U. S. 220.

and apply the rule of those cases to this specific grant and to lands under like circumstances with that in the case at bar.

The writer feels that in view of the misunderstanding of facts under which this case was considered and decided that a rehearing should be granted and respectfully prays that it be so done.

Respectfully submitted,

W. P. BRIGGS,
Attorney for Appellant.

Certificate of Cost of Printing.

I hereby certify that the actual cost of printing the foregoing Petition for Rehearing was $6.75.

W. P. BRIGGS,
Attorney for Appellant.

110 Supreme Court of Iowa.

STATE OF IOWA, *ss:*

Be it remembered, That on the 14th day of February, A. D. 1910, the following proceedings, among others, were had in the Supreme Court of Iowa, to-wit:

26593.

SCOTT LOGAN, Appellant,
vs.
W. R. DAVIS.

Appeal from O'Brien District Court.

In this cause, the Court being fully advised in the premises, file their written opinion affirming the judgment of the District Court. Ladd, J. took no part.

It is therefore considered by the Court that the judgment of the Court below be and it is hereby affirmed, and that a writ of procedendo issue accordingly.

It is further considered by the Court that the Appellant pay the costs of this appeal, taxed at $50.70 and that execution issue therefor.

Signed at the end of the day's assignment.

H. E. DEEMER,
Chief Justice.

111 Supreme Court of Iowa.

STATE OF IOWA, *ss:*

Be it remembered, That on the 14th day of May, A. D. 1910, the following proceedings among others, were had in the Supreme Court of Iowa, to-wit:

26593.

SCOTT LOGAN, Appellant,
vs.
W. R. DAVIS.

O'Brien District Court.

Appellant's Petition for Rehearing having been fully considered, is overruled.

Signed at the end of the day's assignment.

H. E. DEEMER,
Chief Justice.

112 Filed Feb. 11th, 1910.

In the Supreme Court of Iowa.

26573.

SCOTT LOGAN, Appellant,
v.
W. R. DAVIS.

From O'Brien District Court. David Mould, Judge.

The opinion states the case.

W. B. Briggs, for appellant.
Madison B. Davis and Edwin J. Stason, for appellee.

SHERWIN, *J.:*

This is a suit for the recovery of real property, the plaintiff alleging that he is the absolute owner thereof and that the defendant unlawfully keeps him out of possession. The land in controversy is within the limits of the grant by Act of Congress, approved May 12, 1864, granting lands to the State of Iowa, "for the purpose of aiding in the construction of a railroad from Sioux City, in said state to the south line of the State of Minnesota at such point as the said State of Iowa may select, also to said state, for the use and benefit of the McGregor Western Railroad Company for the purpose of aiding
113 in the construction of a railroad from a point at or near Main Street, South McGregor, in a westerly direction * * * until it shall intersect with the said road running from Sioux City to the Minnesota State Line." The grant was of every alternate and numbered section for ten sections in width on each side of the roads, and provides that the lands thereby granted should be subject to the disposal of the legislature of Iowa for the purposes aforesaid: and further provided; "When the Governor shall certify to the Secretary of the Interior that any section of ten consecutive miles of either of said roads is completed, * * * then the Secretary of the Interior shall issue to the state patents for one hundred sections of land for the benefit of the road having completed the ten consecutive miles as aforesaid." It was also provided further, "That if the said roads are not completed within ten years of their several acceptance of this grant, the said lands hereby granted and not patented shall revert to the State of Iowa for the purpose of securing the completion of the said roads within such time, not exceeding five years, and upon such terms as the state shall determine;" and further, that said lands shall not in any manner be disposed of or incumbered except as the same are patented under the provisions of this act: "and should the state fail to complete the said roads within five years after the ten years aforesaid, then said lands undisposed of as aforesaid shall revert to the United States." This grant was duly accepted by the State of Iowa and by the Sioux City & St. Paul Railroad Company, by a

resolution of its board of directors, dated September 19, 1866. The said company afterwards located its line of road, filed its map of location which was accepted by the Secretary of the Interior as the basis of the adjustment of the grant, and in August, 1867, all of the odd numbered sections of land within the twenty mile limits
114 of the Sioux City and St. Paul Railroad, as shown by map of definite location, were withdrawn from sale or other disposition. During the year 1872 the Sioux City Company constructed its road from the Minnesota line south to Le Mars, a distance of 56¼ miles, and the construction of five ten-mile sections of the road was certified to the Secretary of the Interior, who caused to be issued to the state for the use and benefit of the Sioux City Company, patents for land selected by it, amounting to 407,870.21 acres, including the land in controversy. The Sioux City & St. Paul Company never constructed its line south from Le Mars, nor did the state cause that portion of the road to be constructed. By authority of the legislature, the state certified or patented to the Sioux City Company within the granted and indemnity limits a total of 322,412.81 acres. But the land in controversy was not included therein, nor was it ever certified or patented to any railroad company. In 1878, the Chicago, Milwaukee & St. Paul Railway Company, the successor of the McGregor Western Railway Company, completed the construction of its road to Sheldon, Iowa, where it intersected the line of the Sioux City & St. Paul Company, and soon thereafter it brought suit against the latter company for the purpose of determining the title to the land within the overlapping limits. That suit resulted in a decree giving to the Milwaukee Company lands which had been patented to the Sioux City Company, and other lands not patented, but not the land in controversy herein.

See Sioux City & St. Paul R. Co. v. Chicago M. & St. P. R. Co., 117 U. S., 406.

While this suit between the two railroad companies was pending, the legislature in 1882 passed an act resuming and vesting in the state "all lands and rights to lands granted" to the Sioux City Company under the Act of Congress of May 12, 1864, and the Acts of the General Assembly of the state, "which have not been
115 earned by the said railroad company." March 27, 1884, the legislature passed another act which provided that the lands resumed and intended to be resumed by the Act of 1882 were thereby relinquished and conveyed to the United States, and the governor was thereby authorized and directed to certify to the Secretary of the Interior all lands which had theretofore been patented to the state to aid in the construction of the said railroad, and which had not been patented by the state to the Sioux City Company, except lands situated in the counties of Dickinson and O'Brien. This act was complied with in January, 1887, and 26,-117.32 acres were so certified. The land in controversy being in O'Brien county was not included therein. Next in the chronology of events was the Act of Congress of March 3, 1887 (24 U. S. Statutes at Large, P. 556), which act provides as follows:

"SEC. 1. That the Secretary of the Interior be and is hereby authorized and directed to immediately adjust, in accordance with the decisions of the Supreme Court, each of the railroad land grants made by Congress to aid in the construction of railroads and heretofore unadjusted.

"SEC. 2. That if it shall appear upon the completion of such adjustments respectively, or sooner, that lands have been, from any cause, heretofore erroneously certified or patented by the United States to or for the use or benefit of any company claiming by, through or under grant from the United States, to aid in the construction of a railroad, it shall be the duty of the Secretary of the Interior to thereupon demand from such company a relinquishment or reconveyance to the United States, of all such lands, whether within granted or indemnity limits. * * *

"SEC. 4. That as to all lands * * * which have been so erroneously certified or patented as aforesaid, and which have been sold by the grantee company to citizens of the United States, or to persons who have declared their intention to become such citizens, the person or persons so purchasing in good faith, his heirs or assigns, shall be entitled to the land so purchased, upon making proof of the fact of such purchase at the proper land office, within such time and under such rules as may be prescribed by the Secretary of the Interior, after the grants respectively shall have been adjusted."

At the time of the passage of this act, there were lands in O'Brien and Dickinson counties that had been patented to the state but never to the railroad company, and which the state still held, amounting to 21,692.18 acres. At this time also the Sioux City Com-
116 pany had received from the state, patents for all of the lands it had earned, or was entitled to under the grant. On August 11, 1887, the United States requested the state to reconvey to it the 21,692.18 acres which included the land in controversy.

On the 14th day of September, 1888, one Ellen M. Childs entered into a written contract with the Sioux City Company for the purchase of the land in controversy, making a small payment in cash and agreeing to pay the balance in installments. On the 4th day of October, 1889, the United States commenced an action against the Sioux City Company and others asking that its title to the 21,692.18 acres be quieted. Such action was finally tried and resulted in a decree in favor of the United States.

Sioux City & St. Paul Railroad Company v. United States, 159 U. S. 349, 40 L. Ed. 177.

On October 8, 1889, the plaintiff took an assignment of the Childs' contract and on the same day entered into an agreement with the railroad company as follows:

"That in the event of a decision in the above entitled action in the United States Supreme Court adverse to said Sioux City and St. Paul Railroad Company as to the title to the said lands above described, the said parties of the second part will within 90 days thereafter surrender said original agreement and this modification

thereof to the parties of the first part, at St. Paul, Minnesota, and receive therefor from the said parties of the first part, or either of them, the amount which has been paid on the said agreement on account of principal and interest mentioned in said original agreement, and the same to be received and accepted by said second parties in full settlement of all their rights under said original agreement and this modification thereof, and as a release of any and all claims suffered by said parties of the second part, their heirs, executors, administrators or assigns, by reason of the failure of the title of said parties of the first part to said land."

It was also agreed between the plaintiff and the company that the time of the payments would be extended and that the company would pay the taxes.

The facts relative to the possession are as follows: Up until 1884 it was unimproved, vacant, wild prairie. In that year one
117 Bierbower broke a few furrows around the entire half section, but did not reside on the land. In the same year one Peterson broke four or five acres along the south line of the land but left during the same year and made no claim to it. In the same year one Fitzgerald who lived on adjacent land broke six or seven acres in the northeast corner and in 1885 cropped the land broken and continued in possession until 1890, except as hereinafter stated. In 1887, one Weir built a small house on the south half of the northwest quarter of the section, moved into the house with his family and cultivated a part of the land. On the 1st of April, 1888, the defendant bought Weir's improvements and his interest in the land and moved into the house with his family where he has lived up to the present time. Early in 1888, Fitzgerald leased the land of the Sioux City Company, and remained in possession as its tenant that year, and the following year as the tenant of plaintiff's assignor. In the spring of 1888 the defendant sowed five or six acres of oats on breaking that had been done on the land before he moved on to it, but when he attempted to harvest the crop, Fitzgerald took possession thereof and retained same. May 1, 1890, the defendant with a gang of men with teams went on to the land in controversy and broke up that part of it which had not been broken and has since then continued to farm the land. In due time the plaintiff made application for a patent, as a purchaser from the railroad company, and the defendant made due and regular application for the entire quarter section, including the land in controversy, as a homestead. The Secretary of the Interior held in favor of the plaintiff and a patent was issued to him in May, 1901. He then commenced this action, as we have heretofore stated. It was tried in equity and resulted in a decree for the defendant for the north one-half of N. W. ¼—17—97—42, from which the plaintiff appeals. There was a decree for plaintiff as to lot three (3) and no appeal is taken therefrom.

118 The plaintiff relies for a reversal of the judgment upon the following propositions: First, because the defendant acquired possession of the land in controversy by trespass, and under this head it is said that the defendant could not at the time home-

stead ouire than 80 acres, and farther, could then acquire no homestead rights therein because it was then reserved by the United States. Second, an estoppel based on the fact that the plaintiff was a good faith purchaser within the meaning of the Act of Congress of 1887. And further, under the same head, for the reason that the defendant was in privity with the United States and must show that he is entitled to a patent under the homestead law. Third, that both the United States and the defendant are estopped by the allegations of the former in its suit against the Sioux City Company. Fourth, that where one of two equitable titles of equal strength is joined with the legal title without notice of the other equity, the legal title cannot be successfully assailed by the holder of the other equity. And fifth, the equities are with the plaintiff.

In support of the decree the appellee contends that the Act of May 12, 1864, was not a grant in presenti to the Sioux City Company but a grant to the state in trust, the trust to be administered in a particular manner. That the title to the land remained in the state and was restored and reconveyed to the United States as unearned land, and was at no time vested in the railroad company. That the Act of March 3, 1887, was a general one applicable to all grants, but contemplated adjustments only where the grant had vested the title in the railroad company, and not where, as in the Act of 1864, the title remained in the state, or where it had reverted to the United States on account of the failure of the railroad
119 company to earn the grant within the stipulated time. That the appellant was not a purchaser in good faith under the Act of 1887, or independent of it, and is not entitled to protection as such. That the plaintiff being only a speculator and purchaser in bad faith acquired no rights in the land against the defendant's rights as a homestead claimant. That the defendant having made legal settlement on the land, had done all that he is required to do to perfect his homestead right and all that he is required to do to protect it.

It is more convenient to first take up the appellee's propositions. The appellant concedes that the Act of 1864 was not a grant in presenti to the railroad company, hence we need give that subject no consideration. In view of the conclusion which we reach on other matters presented, we deem it unnecessary to determine whether the land in controversy was subject to adjustment under the Act of March 3, 1887. The question was certified to the Supreme Court of the United States in Knepper v. Sands, 194 U. S. 476. It was not definitely determined, however, the court saying that its determination was unnecessary. But the court did say that it was "of the opinion that the fourth section of the adjustment act of 1887 had no reference to any unearned land purchased after the date of that act from a company to whom they had never been certified or patented, although, if it had kept its engagement with the state and completed the road in due time, it could have acquired an interest in them."

The controlling question in this case, as we view it, is whether the plaintiff was a purchaser in good faith within the meaning of

the adjustment act of March 3, 1887. And to determine whether he was or was not such a purchaser, it may be well to summarize the facts bearing thereon. The land was patented to the state in trust for the use and benefit of the railroad company when it
120 should comply with the terms of the grant of 1864. The railroad company be completing five ten mile sections of the road earned a certain number of acres of land, and the land in controversy was within the limits of the third ten mile section. The railroad company never completed the entire road and hence never earned the entire grant. Nor dit the state construct the road that had been left unconstructed by the railroad company. Under the terms of the grant, if the road was not completed by the Sioux City Company within ten years from its acceptance of the grant, it had no right to unearned lands, and if the state failed to secure the completion of the road within five years thereafter, the unearned lands reverted to the United States. The Sioux City Company accepted the grant in September, 1866, and constructed the five ten mile sections of its road in 1872. It had then earned all of the lands that it ever earned and soon thereafter it received patents for more land than it had in fact earned. See,

Sioux City & St. Paul R. Co. v. United States, 159 U. S., 349.

While the railroad company earned the land in controversy by the completion of its third section of road, when it accepted other land in place thereof and then failed to complete the road for which the grant was made, it had no right to the land in controversy, nor any equity therein, and it became a part of the unearned lands which reverted to the United States upon the failure of both the railroad company and the state to complete the road.

S. C. & St. P. R. Co. v. U. S. Supra.

The railroad company had no title to the land in controversy when it leased it to Fitzgerald, nor when it contracted to sell it to Ellen M. Childs in September, 1888. The company undoubtedly knew that it had no right to the land in controversy, and hence its acts
121 were clearly not in good faith. When the plaintiff took an assignment of the Childs' contract, he knew of the suit that had been brought by the United States to quiet its title to the unearned and unpatented lands, and that the land in controversy was included therein. He is presumed to have known the terms of the grant and the character of the railroad company's title, and he at least legally knew that it had absolutely no title. His agreement of October 8, 1889, with the railroad company furnishes abundant evidence of his complete knowledge of the whole situation. In addition thereto, he knew, in a general way at least, the history of the litigation over these lands, and that the title thereto was unsettled. After the defendant had taken possession of the land in 1890, the plaintiff made no move to regain possession, and so far as the record shows, made no claim thereto until this action was commenced. From all of these facts and circumstances we think it must be said that the

plaintiff was not a purchaser in good faith. Good faith in general means without notice as well as for a valuable consideration.

Milton v. Boyd, 49 N. J. Eq. 142,
Talbert v. Horton, 31 Minn. 518,
Kohl v. Lynn, 34 Mich. 360.

In Knepper v. Sands, supra, it was held that as the 4th section of the adjustment act of 1887 had no reference to unearned lands purchased after the date of that act, a purchaser thereafter could not become one in good faith within the meaning of the act. In his reply the appellant says that he does not rely upon any rights under the adjustment act of 1887, except as he relies upon it through an estoppel. But the estoppel relied upon is based on the claim that he was a good faith purchaser under the act, and when it is once determined that he did not so purchase, there can be no estoppel.

To invoke the doctrine of equitable estoppel, the party claim-
122 ing thereunder must show that he was himself unaware of the facts and had no convenient and available means of acquiring the knowledge. Where the facts are known to both parties, or where both have the same means of ascertaining the truth, there can be no estoppel.

11 Am. & Eng. Enc. Law, 434, (2nd Ed.).

The action of the officer of the land department in permitting the plaintiff to press his claim as a contract purchaser, and the subsequent issuance of a patent to him does not estop the defendant from questioning the validity of such patent.

Gjerstadyen v. Van Duzen, 76 N. W. 233, (N. Dak.).
Walker v. Ehresman, 113 N. W. 218.

They were simply mistaken as to both the facts and the law, and the essential elements of an estoppel are lacking.

The appellant's proposition as to the joining of equitable and legal titles has no place here for the reason that the plaintiff had actual notice of a hostile and superior title, and hence never had an equitable title himself.

It is said that the defendant obtained possession of said land by trespass, and because thereof that he can base no homestead rights thereon. If it be conceded that the defendant's original possession of the particular land in controversy in 1890 was obtained by a trespass, it does not follow that he could thereafter obtain no homestead rights. At the time of the trespass he simply invaded the wrongful possession of another. The land was not then subject to public entry for any purpose. The plaintiff apparently acquiesced in the defendant's possession; he at least made no protest, or claim against the defendant until after he received a patent, and when the land became subject to public entry, the defendant had been in peaceable and uninterrupted possession for several years. Under such circumstances we do not think the rule contended for by the appellant is applicable.

123 That the defendant made his homestead claim in good faith is established by the holding of Ship Canal, Railway & Iron Co. v. Cunningham, 155 U. S. 354.

A careful examination of every question presented by the appellant, and of the entire record, leaves no doubt in our minds as to where the equities are. We think the decree of the district court right and it is therefore affirmed.

Affirmed.

Ladd, J., took no part.

124 Filed Apr. 22, 1912. B. W. Garrett, Clerk Supreme Court.

In the Supreme Court of the State of Iowa.

SCOTT LOGAN, Plaintiff in Error,
vs.
W. R. DAVIS, Defendant in Error.

Authentication of Record.

SUPREME COURT,
State of Iowa, ss:

I, B. W. Garrett, clerk of said court, do hereby certify that the foregoing pages, numbered one to —, inclusive, are a true, full and complete transcript of the record and proceedings, in the case of Scott Logan, Plaintiff vs. W. R. Davis, Defendant, and also of the opinion of the court rendered therein, as the same now appear on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office, in Des Moines, Iowa, this Apl. 22d, 1912.

B. W. GARRETT,
Clerk Supreme Court of Iowa.

125 Filed Apr. 22, 1912. B. W. Garrett, Clerk Supreme Court.

In the Supreme Court of the State of Iowa.

SCOTT LOGAN, Plaintiff in Error,
vs.
W. R. DAVIS, Defendant in Error.

Assignment of Errors.

Now comes the above named plaintiff in error, and files herewith his petition for writ of error and shows that there are errors in the record and proceedings in the above entitled case, and for the purpose of having the same reviewed in the Supreme Court of the United States, makes the following assignment of errors:

The above named plaintiff in error claims title to Lot four (4), and the North-west Quarter (N. W. ¼), of North-west Quarter (N. W. ¼) of Section seventeen (17), Township ninety-seven (97), Range forty-two (42), West of the 5th Principal Meridian, O'Brien County, Iowa, under and by virtue of the laws and acts of Congress and the rights, privileges and immunities created, existing and enforceable under and by virtue of the laws of Congress. The validity of said laws, titles, rights, privileges and immunities and of the title and right of plaintiff in error so based thereon were denied by defendant in error in said cause and the decision of the Supreme Court of Iowa was against such their validity.

The Supreme Court of the State of Iowa committed errors in rendering its judgment and decision in the above entitled cause of action in the following particulars, to-wit:

1. The court erred in failing to hold that because of the
126 prior actual possession of the plaintiff in error, whether such possession was under a valid claim or not, defendant in error could obtain or initiate no right or interest in the land in controversy under the United States Homestead laws.

2. The court erred in failing to hold that plaintiff in error and his grantors had been in the prior actual possession of said land and that therefore no rights could be acquired therein under the United States Homestead laws at the time defendant in error attempted so to do.

3. The court erred in holding that defendant in error could acquire or initiate any right or interest in land in controversy at the time he undertook to do so for the reason that plaintiff in error and his grantors had held actual possession of said land for a long time prior thereto and such fact was known to defendant in error.

4. The court erred in failing to hold that defendant in error having obtained possession of the land in controversy by trespass, equity will give him no relief because he must come into equity with clean hands. This suit was brought at law by plaintiff in error to recover possession of land in controversy and defendant in error first invoked the equitable jurisdiction of the court in his counter claim and had case transferred to Equity Docket.

5. The court erred in failing to hold that defendant in error could acquire no rights to land in controversy under Homestead law or otherwise by taking possession thereof at the time he so did, to-wit: in the Spring of 1890, he at said time holding and residing upon 80 acres of double minimum lands which he claimed under the Homestead law, the same being the full quantity of such lands that he was entitled to homestead under the law as then existing.

6. The court erred in failing to hold that defendant in
127 error is estopped from claiming that the Congressional Railroad Grant of May 12, 1864, involving land in controversy, was adjusted prior to the passage of the Adjustment Act of March 3, 1887, (24 Stat., 556) and that therefore or for any other reason said Act of March 3, 1887 did not apply thereto, by the acts of the United States with whom he is in privity through their officers, legally charged with the duty of acting in said matters; to-wit:

1st. The decision of the Secretary of the Interior of July, 1887, holding grant unadjusted and directing Commissioner of the General Land Office to proceed to adjust same;

2nd. The Commissioner's acts in attempting to adjust the grant in compliance with these instructions by preparation of new map of the grant, new computation of acreage, etc., and demand upon the Governor of Iowa in Aug., 1887, for reconveyance of lands claimed to belong to the United States;

3d, the letter of the Secretary of the Interior to the Attorney General in January, 1888, requesting the bringing of suit to adjust grant;

4th, the actual bringing in October, 1889, and prosecution of suit by the United States to adjust this grant and recover said land under Act of 1881;

5th, the letter of November 18, 1895 of the Commissioner of the General Land Office, approved by the Secretary of the Interior, ordering the land in controversy and other lands affected by the decision of the Supreme Court of October 21, 1895, opened to entry, with a right reserved for the first ninety days after the notice of such opening, for claimants under the Act of 1887, to give notice of their claims;

128 6th, the notice given and published by the Register and Receiver, in accordance with above, opening said lands to entry and reserving said rights to claimants under the said Act of 1887;

7th, the holding and ruling by all officers of the Land Department, particularly the Commissioner of the General Land Office and Secretary of the Interior, in all matters coming before them affecting these lands that the said Act of 1887 applied thereto;

8th, the constant refusal of the proper officers of the Land Department to receive entr-*ys* under the public land laws for any of these lands, and informing all inquirers that the same were not subject to entry, and were within the Railroad grant. All of said acts recognizing said grant as not having been adjusted until the decision of the Supreme Court of October 21, 1895, and the Act of March 3, 1887 as applying thereto and plaintiff in error having purchased said land and paid the government price $216.08 in reliance thereon;

9th, the holding of the Secretary of the Interior on August 10th, 1900 the plaintiff in error was a good faith purchaser of land in controversy within the meaning of said Act of March 3, 1887 and had the right to purchase same as such, and the acceptance and retention of the purchase money paid by the plaintiff in error for said land under his entry so allowed by the Secretary of the Interior.

7. The court erred in failing to hold that defendant in error is estopped from claiming that land in controversy had reverted to the United States under reversionary clause of the Act of Congress of May 12, 1864, (13 Stat., 72) or had passed to it by virtue of the Acts of the Iowa Legislature of March 16, 1882 (19 G. A., 107) and of March 27, 1884, (20 G. A., 71) by reason of the said facts stated in assignment # 6 as constituting an estoppel.

129 8. The court erred in failing to hold that the defendant in error is estopped from claiming that plaintiff in error was not a good faith purchaser of the land in controversy within the meaning of the said Act of Congress of March 3, 1887, by the holding of the Secretary of Interior on August 10, 1900 that plaintiff in error was such good faith purchaser within the meaning of said act and entitled to purchase said land as such and the purchase thereof and the payment therefor by plaintiff in error relying thereon, the purchase price being retained by the United States with whom the defendant in error is in privity and the Secretary of Interior being legally charged with the duty of acting for the United States in said matter.

9. The court erred in failing to hold that the defendant in error is estopped from claiming that plaintiff in error acquired no right or interest in the land in controversy by patent issued to him under the Act of March 3, 1887, therefor, by the United States, offering it for sale and disposal under said Act of March 3, 1887, and determining and holding that plaintiff in error was entitled to purchase it thereunder and accepting and retaining the purchase price paid by the plaintiff in error therefor, defendant in error being in privity with the United States.

10. The court erred in failing to hold that plaintiff in error was a good faith purchaser of land in controversy within the meaning of the said Act of Congress of March 3, 1887.

11. The court erred in failing to hold that the United States is estopped by its allegations in the suit against the Sioux City Company to adjust the grant and in which it recovered the land in controversy, that the Act of March 3, 1887 applied to the grant in question, from now asserting the contrary, and that the defendant
130 in error is likewise estopped, being in privity with the United States and said suit being a part of his chain of title.

12. The court erred in finding that at the time plaintiff in error took the assignment of the Childs contract he knew of the suit that had been brought by the United States to quiet its title to the unpatented lands and that the land in controversy was included therein, there being no proof or presumption of such facts, while there is direct and positive evidence to the contrary.

13. The court erred in finding that plaintiff in error had knowledge of the defects in the Railroad Company's title to the land in controversy on the 8th day of October, 1889, the date of the purchase by plaintiff of said land from Mrs. Childs, said finding being based upon the further finding that upon that day plaintiff in error entered into an agreement with the Railroad Company, the record herein conclusively showing that said agreement with the Railroad Company was not entered into until the 13th day of March, 1894.

14. The court erred in finding that plaintiff in error entered into an agreement with the Railroad Company in reference to the land in controversy on the 8th day of October, 1889, the record in fact showing that said agreement was entered into between said parties on the 13th day of March, 1894.

15. The court erred in finding upon the facts and record in this case that plaintiff in error, at the time of his purchase of the land in controversy from Mrs. Childs, on October 8, 1889, had actual knowledge of the defects in the title thereto, there being no evidence or presumption upon which to base it, and there being direct evidence to contrary.

16. The court erred in holding that plaintiff in error made no claim against defendant in error after the latter's taking pos-
131 session of the land in controversy until after patent had issued therefor, the record conclusively showing that he had conducted a contest in the various branches of the Land Department claiming the land against defendant in error for nearly five years during said time.

17. The court erred in failing to hold that defendant in error was not in position to question title of plaintiff in error for the reason that his rights, if any, were initiated after the purchase and actual possession of plaintiff in error and said defendant in error's knowledge thereof.

18. The court erred in failing to hold that land in controversy was reserved by the United States from Homestead entry at the time defendant in error entered thereon and because thereof he could obtain no rights therein, and that its subsequent restoration to public domain was immaterial in aiding a defendant in error in this regard.

19. The court erred in failing to hold that it was contrary to equity and good conscience to set aside the title of plaintiff in error in favor of defendant in error under the undisputed facts herein, to wit: that plaintiff in error had purchased the land in controversy for full value in good faith, believing and advised by his attorneys that the Sioux City Company had earned the land and he was getting a good title thereto; that same was then and for some years had been in the peaceable actual possession of the Sioux City Company, its tenants and grantee who sold to plaintiff in error and was in said possession at the time of purchase by plaintiff in error; that same lay in place limits opposite the third of five fully completed ten mile sections of said Company's road; that it had been held by the United States Circuit Court, affirmed by the United States Supreme Court in a suit against another railroad company, to have been earned by the Sioux City Company and had been set off to it; that
132 when recovered by the United States in the suit brought to adjust the grant under the Act of March 3, 1887, it was offered by the United States for disposal under the provisions of said act and awarded by the United States to plaintiff in error who paid the government price therefor which is retained; that defendant in error's claim originated by him with knowledge of such prior possession of plaintiff in error and of his grantors, taking possession from plaintiff in error claiming to do so under the Homestead law when he then held and occupied and still retains the land he was entitled to under the Homestead law as then existing.

For which errors the plaintiff in error Scott Logan, prays that the judgment of the Supreme Court of the State of Iowa in the above

entitled cause dated —— —, 1910 be reversed and a judgment rendered in favor of the said plaintiff in error and for costs.

W. P. BRIGGS,
ELBERT H. HUBBARD,
Attorneys for Scott Logan.

133 Filed Apr. 22, 1912. B. W. Garrett, Clerk Supreme Court.

In the Supreme Court of the State of Iowa.

SCOTT LOGAN, Plaintiff in Error,
vs.
W. R. DAVIS, Defendant in Error.

Petition for Writ of Error to the Supreme Court of the United States.

Considering himself aggrieved by the final decision of the Supreme Court of the States of Iowa in rendering judgment against him in the above entitled case, the plaintiff in error, Scott Logan, hereby prays a writ of error from said decision and judgment to the Supreme Court of the United States and an order fixing the amount of a supersedeas bond.

Assignment of errors herewith.

W. P. BRIGGS,
ELBERT H. HUBBARD,
Attorneys for Plaintiff in Error.

STATE OF IOWA,
Supreme Court, ss:

Let the writ of error issue upon the execution of a bond by Scott Logan to W. R. Davis, in the sum of $1,000.00 *Dollars;* such bond when approved to act as a supersedeas.

Dated April 20, 1912.

EMLIN McCLAIN,
Chief Justice Supreme Court of Iowa.

134 Filed Apr. 22, 1912. B. W. Garrett, Clerk Supreme Court.

In the Supreme Court of the State of Iowa.

SCOTT LOGAN, Plaintiff in Error,
vs.
W. R. DAVIS, Defendant in Error.

Bond.

Know all men by these presents, That we, Scott Logan as principal and John J. Large and John McHugh as sureties, are held and firmly bound unto W. R. Davis in the sum of one thousand Dollars,

to be paid to the said W. R. Davis, to which payment, well and truly to be made, we bind ourselves jointly and severally firmly by these presents.

Sealed with our seals, and dated this nineteenth day of April 1912.

Whereas, the above-named plaintiff in error seeks to prosecute his writ of error to the United States Supreme Court to reverse the judgment rendered in the above entitled action by the Supreme court of the State of Iowa.

Now, therefore, the condition of this obligation is such, that if the above-named plaintiff in error shall prosecute his said writ of error to effect, and answer all costs and damages that may be adjudged if he shall fail to make good his plea, then this obligation to be void, otherwise to remain in full force and effect.

SCOTT LOGAN, *Principal,*
By W. P. BRIGGS,
His Attorney.
JOHN McHUGH,
JOHN J. LARGE,
Sureties.

135 STATE OF IOWA,
Woodbury County, ss:

John J. Large & John McHugh, being each duly sworn, on oath depose and say: We are each of lawful age and are citizens of the State of Iowa, and know the contents of the foregoing instrument to which we have attached our names. We each for himself say we are worth the sum of One Thousand Dollars in property situated in the State of Iowa, over and above all debts, liabilities and exemptions.

JOHN McHUGH.
JOHN J. LARGE.

Subscribed and sworn to before me this 19" day of April 1912.

[Notarial Seal Lyle Hubbard, Sioux City, Woodbury Co., Iowa.]

LYLE HUBBARD,
Notary Public in and for Woodbury County, Iowa.

Bond approved and to act as a supersedeas.
Dated April 20 1912.

EMLIN McCLAIN,
Chief Justice Supreme Court of Iowa.

136 Filed Apr. 22, 1912. B. W. Garrett, Clerk Supreme Court.

In the Supreme Court of the State of Iowa.

SCOTT LOGAN, Plaintiff in Error,
vs.
W. R. DAVIS, Defendant in Error.

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Iowa, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Scott Logan and W. R. Davis, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute or commission; a manifest error hath happened, to the great damage of the said Scott Logan, as by his complaint appears.

137 We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, this 20th day of April in the year of our Lord one thousand nine hundred and twelve.

[Seal U. S. District Court, Southern District of Iowa.]

WM. C. McARTHUR,
Clerk Circuit Court United States, Southern District of Iowa.

Allowed, April 20, 1912.
EMLIN McCLAIN,
Chief Justice Supreme Court of Iowa.

138 Filed Apr. 22, 1912. B. W. Garrett, Clerk Supreme Court.

In the Supreme Court of the State of Iowa.

SCOTT LOGAN, Plaintiff in Error,
vs.
W. R. DAVIS, Defendant in Error.

Certificate of Lodgment.

SUPREME COURT,
State of Iowa, ss:

I, W. B. Garrett, clerk of said court, do hereby certify that there was lodged with me as such clerk on April 22, 1912, in the matter of Scott Logan versus W. R. Davis:

1. The original bond of which a copy is herein set forth.
2. Three copies of the writ of error, as herein set forth, one for each defendant, and one to file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office, in Des Moines, Iowa, this 22d of Apr., 1912.

[Seal of the Supreme Court of Iowa.]

B. W. GARRETT,
Clerk Supreme Court of Iowa.

139 In the Supreme Court of the State of Iowa.

SCOTT LOGAN, Plaintiff in Error,
vs.
W. R. DAVIS, Defendant in Error.

Citation.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to W. R. Davis, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the Supreme Court of the State of Iowa, wherein Scott Logan is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Chief Justice of the Supreme Court of the State of Iowa, this April 20, 1912.

EMLIN McCLAIN,
Chief Justice Supreme Court of State of Iowa.

Attest:
B. W. GARRETT,
Clerk Supreme Court of Iowa.

140 SIOUX CITY, IOWA, *April* 20, 1912.

I, attorney of record for the defendant in error in the above entitled case, hereby acknowledge due service of the above citation, and enter an appearance in the Supreme Court of the United States.

M. B. DAVIS,
Attorney for W. R. Davis.

141 Filed Apr. 22, 1912. B. W. Garrett, Clerk Supreme Court.

In the Supreme Court of the State of Iowa.

SCOTT LOGAN, Plaintiff in Error,
vs.
W. R. DAVIS, Defendant in Error.

Return to Writ.

UNITED STATES OF AMERICA,
Supreme Court of Iowa, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, together with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court of Iowa, in the City of Des Moines, this 22nd of April, 1912.

[Seal of the Supreme Court of Iowa.]

B. W. GARRETT,
Clerk Supreme Court of Iowa.

Costs of Suit.

Plaintiff's costs.....	$161.50
Defendant's Costs.....	50.70
Costs of transcript.....	10.00

B. W. GARRETT, *Clerk.*

Endorsed on cover: File No. 23,188. Iowa Supreme Court. Term No. 247. Scott Logan, plaintiff in error, vs. W. R. Davis. Filed April 29th, 1912. File No. 23,188.

19

Office Supreme Court, U. S.
FILED
FEB 10 1914
JAMES D. MAHER
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 247.

SCOTT LOGAN, PLAINTIFF IN ERROR,

vs.

W. R. DAVIS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

PLAINTIFF IN ERROR'S BRIEF AND ARGUMENT.

W. D. BOIES,
WILLIAM MILCHRIST, AND
GEORGE C. SCOTT,
Solicitors for Plaintiff in Error.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 247.

SCOTT LOGAN, PLAINTIFF IN ERROR,

vs.

W. R. DAVIS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

PLAINTIFF IN ERROR'S BRIEF AND ARGUMENT.

The Issues.

This suit was begun by plaintiff in error Logan as an action at law in the nature of ejectment under the Iowa Code to recover possession of the land in controversy, the plaintiff Logan alleging that he was the absolute owner thereof, and that defendant Davis unlawfully kept him out of possession.

The defendant Davis answered and counter-claimed, denying ownership in plaintiff, and setting up the equitable

defense and claim that he, by reason of settlement and claim under the homestead laws of the United States, was entitled to the possession of such land.

The plaintiff in error replied to defendant's answer and counter-claim, reasserting title, and pleading that he was a good-faith purchaser from a railroad company holding apparent title under the act of Congress of May 12, 1864, granting lands to the State of Iowa for its use and benefit, also pleading an act of Congress of March 3, 1887, for the protection of good-faith purchasers in such cases, and his compliance therewith, and the issue of confirmatory patent thereunder. The plaintiff in error further pleaded that he was in the actual and open possession of said land under purchase from such railroad company in good faith before the defendant in error made any attempt to lay claim under the homestead laws, and that defendant in error unlawfully and by force invaded his prior actual possession by "secretly, surreptitiously, unlawfully, and without any shadow of right, violently entering into possession of said premises," and has ever since kept the plaintiff out of possession under the pretense that he held the same under the homestead laws of the Unitd States. The plaintiff in error further pleaded equitable estoppel against the United States and the defendant in error by reason of the facts set out, and which appear in the stipulation of facts set out in the record.

TRANSFER TO EQUITY.

Trial and Judgment.

On motion of the defendant in error the cause was by order of the District Court of Iowa in and for O'Brien County, in which it was pending, transferred to the equity docket and tried as an equity cause, and upon submission the decree was entered dismissing plaintiff's petition, annulling his confirmatory patent, and quieting title to the land in controversy in the defendant Davis.

The Appeal.

In due time the plaintiff in error appealed from the judgment of the District Court of O'Brien County to the Supreme Court of Iowa, said appeal being heard on February 11, 1910. The Supreme Court of Iowa affirmed the decree of the District Court, holding, first, that the plaintiff in error was not a good-faith purchaser within the meaning of the act of Congress approved March 3, 1887; and, second, that notwithstanding defendant in error's original possession was obtained by a trespass, he had acquired a right to hold said land under the homestead laws of the United States.

Statement of the Case.

The case was tried and submitted upon an agreed statement of facts, and the testimony of the plaintiff in error taken by deposition. From the agreed statement of facts it appears (pertaining to the railroad's title)—

That on May 12, 1864, Congress passed an act granting lands to the State of Iowa to aid in the construction of a railroad from Sioux City, in the State of Iowa, to the south line of the State of Minnesota, and also to the State of Iowa for the use and benefit of the McGregor Western Railroad Company for the purpose of aiding in the construction of a railroad from a point in South McGregor, on the Mississippi River, in said State, westerly to an intersection with said railroad running from Sioux City to the Minnesota line.

The grant carried every alternate section of land designated by odd numbers for ten consecutive sections in width on each side of said roads to which the right of pre-emption or homestead settlement had not attached at the time of the definite location of such roads; and where any alternate sections within said ten-mile limit had been sold, or pre-emption or homestead settlement attached at the time of the definite location of the road, the Secretary of the Interior was au-

thorized to select as indemnity therefor other lands in alternate sections within limits of twenty miles from said roads. The zone limited to ten miles on either side of the roads is referred to in the record as "granted limits" or "place limits," and the zone beyond, limited to twenty miles on either side of the roads, is referred to as the "indemnity limits."

The grant carries a further provision:

> "When the Governor of said State shall certify to the Secretary of the Interior that any section of the ten consecutive miles of either of said roads is completed in a good, substantial, and workmanlike manner as a first-class railroad, then the Secretary of the Interior shall issue to the State, patents for one hundred sections of land, for the benefit of the road having completed the ten consecutive miles as aforesaid. When the Governor of said State shall certify that another section of ten consecutive miles shall have been completed as aforesaid, then the Secretary of the Interior shall issue patents to said State in like manner, for a like number, and when certificates of the completion of additional sections of ten consecutive miles of either of said roads are from time to time, made as aforesaid, additional sections of land shall be patented as aforesaid, until said roads, or either of them, are completed, when the whole of the lands hereby granted shall be patented to the State for the uses aforesaid and none other."

On April 20, 1866, the General Assembly of Iowa accepted the grant, and in September, 1866, the Sioux City & St. Paul Railroad Company filed in the office of the Secretary of State of Iowa its acceptance of the grant of Congress and the acts of the General Assembly of Iowa upon the terms, conditions, and limitations therein contained.

On the 27th day of September, 1866, the Sioux City & St. Paul Company commenced the location of its line, and on October 4, following, completed such location to the south line of Minnesota; and on the 2d of April, 1867, cer-

tified to and filed its map of location with the Secretary of State of Iowa, which was immediately afterwards certified by the Governor and such Secretary, and filed with the Secretary of the Interior of the United States, and accepted by the Secretary of the Interior as the basis of adjustment of the grant. The lands so granted within the odd numbered sections of said twenty-mile limits were then withdrawn from entry under the pre-emption and homestead laws, and, in September, 1867, the withdrawal filed with the Register of the Land Office at Sioux City.

In 1872 the Sioux City & St. Paul Company commenced construction of its line from a connection with the St. Paul & Sioux City Railroad at a point on the south line of Minnesota, and constructed in a southerly direction to the town of Le Mars in the State of Iowa, but did not construct between Le Mars and Sioux City, but operated its trains over the rails of another road previously constructed.

In February, 1873, the Sioux City & St. Paul Railroad Company selected the tract in controversy with other lands as and for a part of the lands inuring to it under said act of Congress of May 12, 1864, and filed a written list of said selection with the Register and Receiver of the Land Office at Sioux City, Iowa. Said officers, in March, 1873, allowed and approved the filing of said list and certified the same as being within the ten-mile limits of said grant and as being free and clear of homestead, pre-emption, State, or other valid claims, which list was duly transmitted to the Commissioner of the General Land Office.

The Commissioner of the General Land Office, in June, 1873, approved the said selection and transmitted to the Secretary of the Interior a list embracing said tract of land.

In the same month the Secretary of the Interior approved said selection and certificate, and caused copies of such approved list to be filed with the Register and Receiver at Sioux City, Iowa, and with the Governor of Iowa.

That on June 17, 1873, the Secretary of the Interior caused to be patented to the State of Iowa for the use and

benefit of the railroad company the tract in controversy herein, and a large amount of other land as and for a part of the lands inuring to the said State for the use and benefit of said railroad.

In conformity with the terms of the grant, whenever ten consecutive miles of road were constructed the same was certified to the Secretary of the Interior and patents were issued by the United States within the limits of the grant opposite the sections so constructed.

The Chicago, Milwaukee & St. Paul Railroad Company became the successor of the McGregor Western, and completed the construction of its road from McGregor to an intersection of the Sioux City & St. Paul line in O'Brien County, Iowa. A controversy here arose because of the overlapping of grants, and the Milwaukee Company commenced suit in the Circuit Court of the United States in the Northern District of Iowa against the Sioux City Company for the adjustment of its rights, which suit was prosecuted through the Circuit and Supreme Courts of the United States, and in May, 1886, a decree was entered apportioning the lands, the particular land involved in this action being assigned to the Sioux City Company.

Subsequent to the occurrences and events stated, it having been made apparent that more lands had been certified to the Sioux City & St. Paul Railroad Company than that company had earned under the provisions of the grant, the Iowa General Assembly relinquished to the United States all the lands which had not been earned by said railroad. The circumstances which led to this overcertification were due to the overlapping of the grants referred to and the determination by the courts that the companies must each take a moiety, and were not entitled to indemnity for diminutions, and the further fact that under the terms of the grant lands could only be certified upon the completion of ten-mile sections, and the stopping of construction at Le Mars left an uncompleted section of six and a fraction miles. At the out-

set the railroad claimed the lands within the limits designated opposite the constructed portion of the road as far as Le Mars, and the State officials recognized this claim and certified a sufficient amount of land to meet this contention. When a different construction had been placed upon the act by the courts, the overcertification of the railroad company became apparent, and hence proceedings which resulted in the relinquishment of the unearned lands by the State of Iowa to the United States Government.

"The Legislature of Iowa passed the following act, published as 20 G. A., chap. 71, approved March 27, 1884, entitled (full title): Recites the grant to the State by act of Congress May 12, 1864, the acceptance by the State, and conferring the benefits of grant on Sioux City Company by acts of April 3 and April 20, 1866, and that 'said railroad company duly accepted said grant but failed to complete said railroad, as required by the terms and conditions of said grant.' Also recites the passage by the Legislature of the act of Mar. 16, 1882, resuming unearned lands by the State, and that 'it is desirable that all lands and rights to lands resumed by the State of Iowa as aforesaid should be conveyed to and vested in the United States to the end that such lands shall be made subject to the use of actual settlers as provided by the acts of Congress relating thereto; now therefore, be it enacted, etc.

"'SEC. 1. That all lands and all rights to lands resumed and intended to be resumed by chapter one hundred and seven (107) of the acts of the 19th General Assembly of the State of Iowa are hereby relinquished and conveyed to the United States.

"'SEC. 2. The Governor of the State of Iowa is hereby authorized and directed to certify to the Secretary of the Interior all lands which have heretofore been patented to the State to aid in the construction of said railroad, and which have not been patented by the State to the Sioux City & St. Paul Railroad Company, and the list of lands so certified by the Governor shall be presumed to be the lands relinquished and conveyed by section 1 of this act. Provided

that nothing in this section contained be construed to apply to lands situated in the counties of Dickinson and O'Brien" (par. 25).

"That on January 15, 1887, an application was addressed to the Secretary of the Interior on behalf of certain settlers in O'Brien and Dickinson counties, Iowa, referring to the land in controversy, and other lands not patented by the State to either the Milwaukee Company or the Sioux City Company, requesting that the Attorney General of the U. S. be asked to commence and prosecute a suit on behalf of the United States, asserting title in it to said land, and said application was duly heard by said Secretary of the Interior and on such hearing were heard counsel for each of the said railroad companies, and said Secretary of the Interior decided the same, and reduced his decision to writing, in the form of a letter dated July 26, 1887, addressed to the Commissioner of the General Land Office, true copy of which is attached hereto as Exhibit '2' " (par. 27).

"That acting upon said decision and the order contained in said 'Exhibit 2' the Commissioner — General Land Office on August 11, 1887, sent to the Governor of Iowa a communication in regard thereto, true copy of which is attached as Exhibit '3' " (par. 28).

"That on January 11, 1888, the record and papers in said matter having been returned by the Commissioner of the General Land Office to the Secretary of the Interior, said Secretary sent to the Attorney General of the U. S. a communication relative to the commencement of a suit for the recovery of said lands, copy of which is attached hereto as Exhibit '4' " (par. 29).

That on October 4, 1889, the Attorney General of the United States brought action as hereinafter narrated.

But in the meantime a large amount of these lands had been sold by the Sioux City & St. Paul Railroad Company, and on March 3, 1887, Congress passed an act entitled, "An act to provide for the adjustment of land grants made by Congress to aid in the construction of railroads and for the

forfeiture of unearned lands, and for other purposes" (pertaining to plaintiff in error's right and title).

The land in controversy was wholly vacant, unoccupied, unimproved, wild prairie prior to 1884. During that year one Fitzgerald, who was then living upon the quarter section adjoining on the north, broke out six or seven acres in the northwest corner of the land in controversy, and in 1885 cropped it and continued from that time until the spring of 1890 in the uninterrupted, undisturbed possession of the land in controversy, except as follows:

In the spring of 1888 defendant in error took several teams, and without the consent of Fitzgerald, went on some of the broken land in controversy and sowed five or six acres thereof to oats. Thereafter defendant in error attempted to harvest the oats, but possession thereof was taken by Fitzgerald. Thereupon defendant brought suit against Fitzgerald for the oats and possession of the land in controversy, and said action was decided in favor of Fitzgerald, and he retained both the crop and possession of the land.

Early in 1888 Fitzgerald entered into a written lease with the Sioux City & St. Paul Railroad Company for the land in controversy and remained in possession thereof during the year 1888 as tenant of the Sioux City & St. Paul Railroad Company thereunder, and thereafter as tenant of the purchaser from the said railroad company (par. 51, p. 39).

On September 11, 1888, one Ellen M. Childs purchased the land in controversy from the Sioux City & St. Paul Railroad Company for the sum of $1,270.64, to be paid upon the terms set forth in the contract attached to defendant's answer and counterclaim as Exhibit B. That at the time of purchase she paid the Sioux City & St. Paul Railroad Company $88 cash payment called for by said contract, and made no further payments under the contract.

That at the time she so purchased the land it was in the actual possession of Fitzgerald as tenant for the Sioux City & St. Paul Railroad Company; that said company's posses-

sion through said tenant was undisturbed and undisputed, and said company sold the land to Ellen M. Childs as a part of the grant under act of May 12, 1864, delivered possession thereof to her through the possession of its tenant, Fitzgerald, and she continued in the uninterrupted and undisturbed possession thereof through said tenant until October 8, 1889 (par. 46, p. 37).

On October 8, 1889, said Ellen M. Childs sold the property in controversy to the plaintiff for the sum of $228, subject to the balance then remaining unpaid to the Sioux City & St. Paul Railroad Company under her contract, plaintiff paying $228 in cash and receiving an assignment of the contract (par. 47, p. 38).

The said Ellen M. Childs and the plaintiff in error were at said times and have been ever since citizens of the United States.

On or about May 1, 1890, the defendant in error, who resided upon the eighty-acre tract adjoining the land in controversy on the south, with a gang of men and teams went on the land in controversy and broke up that part of it which had not been theretofore broken, except about fifteen acres, and cropped the same, and had been so in possession thereof for more than thirty days before plaintiff in error learned that he had so taken possession, and the defendant in error has ever since continued to farm the land in controversy (pars. 48, 49, p. 38).

That defendant in error at no time has lived upon nor had any buildings upon the land in controversy, nor enclosed the same by fence except to enclose a pasture of about twenty acres situated partly on the land in controversy and partly on the eighty acres adjoining on the south (par. 50, p. 38).

That at the time defendant in error entered upon the property in controversy and broke up the same in the spring of 1890, he knew that the same was in the possession of John Fitzgerald, who had been the tenant thereon and had farmed

and cultivated the same during the year 1889 as tenant for said Ellen M. Childs; that said Ellen M. Childs had sold said land to the plaintiff in October, 1889, Fitzgerald becoming thereupon the tenant of plaintiff in error; that said land was claimed and had for many years been claimed by the Sioux City & St. Paul Railroad Company as and for a part of its grant; that said land had been declared to belong to said railroad company by the United States Court in the case between said company and the Milwaukee Company; that in said suit the land had been set off to the Sioux City & St. Paul Company as its property; that said company had for many years claimed that it had earned said land and was entitled thereto; that at that time and for many years prior thereto the officers of the Land Department of the United States had refused to recognize applications to file thereon under the homestead laws; and that said officials claimed that said land and other lands of its class were not subject to entry for the reasons heretofore stated (par. 62, p. 41).

That the land in controversy lies about 22 miles south of the Minnesota State line and immediately adjacent to the right of way of the Sioux City & St. Paul Railroad as located and constructed (par. 63, p. 42).

That on October 4, 1889, the Attorney General of the United States brought an action on behalf of the United States against the Sioux City & St. Paul Company in the Circuit Court of the United States for the Northern District of Iowa to recover the land in controversy and other lands under the act of March 3, 1887. Neither Ellen M. Childs, nor the plaintiff in error, nor John Fitzgerald, tenant in possession, were made parties defendant to said action. On the trial of said cause, the Circuit Court rendered decree December 18, 1890, in favor of the United States, and the Sioux City & St. Paul Company appealed therefrom to the Supreme Court of the United States, and October 21, 1895, the Supreme Court affirmed said decree (pars. 30, 31, pp. 32, 33).

After the purchase by plaintiff from Ellen M. Childs of the land, and on March 13, 1894, an agreement was entered into in writing between plaintiff and the Railroad Company, extending the time of payment on the unpaid payments under the contract for the sale of said land until ninety days after a decision should be filed by the Supreme Court of the United States in said case of the United States against the Railroad Company, brought in October, 1889 (par. 60, p. 41; Exhibit D, p. 8).

On November 18, 1895, the Commissioner of the General Land Office by letter approved by the Secretary of the Interior directed the Register and Receiver of the United States Land Office to give notice of restoration to public entry of the lands embraced in said decree, on a day to be fixed by the notice, which should be ninety days from the date of the first publication, and that all persons claiming any part thereof under the act of March 3, 1887, must come forward within ninety days immediately following the first publication, and give notice of intention to make proof in accordance with the requirements of the circular of February 13, 1889, upon a day which should be subsequent to that fixed for the restoration (par. 33, p. 33).

That, complying with said order and instructions, the Register and Receiver duly fixed February 27, 1896, as the date upon which said land would be restored to public entry, and as the date within ninety days prior to which claimants of said lands under the act of March 3, 1887, should give notice of their claims, etc. (par. 34, p. 34).

That during the said ninety days prior to February 27, 1896, plaintiff in error duly published his notice of intention to make proof of rights to said land under said act of March 3, 1887, and on January 7, 1896, he filed with the Register and Receiver claiming the land in controversy under said act (par. 52, p. 39).

That on February 27, 1896, defendant filed homestead application in the office of the Register and Receiver for the

northwest quarter of said section 17, including the land in controversy. That a hearing was ordered between said parties to be held before the Register and Receiver on May 13, 1896, and due notice of said hearing given, and said hearing was had at said time (par. 53, p. 39).

That after the said hearing and on April 23, 1897, the Register and Receiver decided said contest in favor of defendant in error Davis, holding that as plaintiff in error knew that the Governor of Iowa had refused to patent the land to the Railroad Company, he was not entitled to protection under the act of March 3, 1887, and that defendant's improvements and residence on the land (being situated on the south half of the northwest quarter of said section 17) gave him the right of homestead entry. From the decision of the Register and Receiver, the plaintiff in error appealed to the Commissioner of the General Land Office, and on August 12, 1899, decision was rendered affirming the decision of the Register and Receiver based wholly upon the ground that when the plaintiff in error had entered into the modified contract the terms of which were precisely the same as those contained in the contract by Ole Olson, in the case of Olson *vs.* Traver, 26 L. D., 350. From the decision of the Commissioner the plaintiff in error appealed to the Secretary of the Interior, and on August 10, 1900, the Secretary decided the case, reversing the decision of said Commissioner, holding that such contracts were no longer considered as fatal to the application for confirmatory patent, and that "whatever possession Davis may have obtained of the tract was obtained after the purchase from the Railroad Company and long after the tract had been patented to the State of Iowa for the use and benefit of the Railroad Company." And that "his settlement availed him naught as against the *bona fide* purchaser of the tract from the Railroad Company. The decision of the Commissioner as to Logan is therefore reversed, and his application for confirmatory patent allowed" (pars. 54, 55, 56, pp. 39, 40).

That thereupon plaintiff in error paid to the United States the Government price of $2.50 per acre for said land, $88 being paid by said Sioux City & St. Paul Railroad Company, and patent was duly issued to plaintiff for said land, which patent was dated May 27, 1901, and was duly recorded, etc. (par. 57, p. 40).

In addition to the facts in evidence under the stipulation, the plaintiff in error on the trial offered his own testimony taken by deposition. That testimony will be found commencing on page 46 and terminating on page 49 of the transcript of record. The testimony shows a purchase in the utmost good faith and for full value. This testimony is not contradicted, and the defendant in error offered no testimony on the trial.

On May 1, 1901, this suit was begun and prosecuted with the results hereinbefore set out, and the plaintiff brings the case to this court upon writ of error, nineteen separate errors being assigned as set forth, beginning at page 66 of the transcript of record.

BRIEF.

Plaintiff in error has assigned nineteen separate errors upon each of which he asks a reversal of the decision of the Supreme Court of the State of Iowa. As it appears to us, these numerous assignments may be classified and argued in groups which may be embodied in single propositions.

Assignments 1, 2, 3, 4, 17, and a portion of 19 seem to state the same idea in different forms and go direct to the question of the defendant in error's right to maintain the cause of action presented by his counter-claim.

Assignments 10, 12, 13, 14, 15, and a portion of 19 raise the question as to whether plaintiff in error may be considered a good-faith purchaser under the act of Congress of March 3, 1887.

Assignments 6, 7, 8, and 9 raise the question of estoppel against the defendant in error by reason of the action and conduct of the United States Government.

PROPOSITION I.

(Defendant Cannot Maintain Counter-claim.)

The plaintiff in error being in actual possession of the land in controversy under claim of right in good faith made, and the defendant in error with full knowledge of such possession and claim having wrongfully invaded such prior actual possession, initiated no right under the homestead law and he can not maintain his counter-claim.

Lyle *vs.* Patterson, 228 U. S., 211.
Atherton *vs.* Fowler, 96 U. S., 213.
Hosmer *vs.* Wallace, 97 U. S., 575.
Swanson *vs.* Sears, 224 U. S., 180.
Quimby *vs.* Conlan, 104 U. S., 420.
U. S. *vs.* Southern Pac. R. R., 184 U. S., 49.
U. S. *vs.* Winona R. R., 165 U. S., 463.

PROPOSITION II.

(Plaintiff Entitled to Protection under Act of March 3, 1887.)

The plaintiff in error having purchased the land in good faith while it was in the undisputed possession of the Railroad Company, and before any attempt was made to initiate any homestead right by settlement, improvement, or taking possession, was entitled to protection under the act of March 3, 1887, even though the purchase was made after the passage of said act.

U. S. *vs.* Southern Pacific Railroad Co., 184 U. S., 49.

U. S. *vs.* Winona Railroad Co., 165 U. S., 463.

Knepper *vs.* Sands, 194 U. S., 476.

PROPOSITION III.

(United States and Defendant Are Estopped.)

All of the circumstances and conditions being such that the plaintiff in error would be entitled to protection under the act of March 3, 1887, had his purchase dated prior to the approval of that act, and the United States Government having treated said act as applying to the plaintiff in error's purchase, and having invited the plaintiff to an adjustment of his claim under that act, and having adjusted such claim and received the full purchase price from the plaintiff in error and issued to him its patent, the United States Government is now estopped from denying the validity of such patent, and the defendant in error, claiming in privity with the United States Government and with notice and knowledge of the acts of the United States when he proffered his homestead filing on February 27, 1896, is also estopped.

The doctrine of "estoppel by deed" applies to and binds the Government and persons in privity with it or claiming under it.

Branon *vs.* Worth, 84 U. S., 32.

The doctrine of equitable estoppel applies to the United States the same as to a private person.

See—

James *vs.* Germania Iron Co., 107 Fed., 597-618.

This doctrine was announced in U. S. *vs.* Stinson, 125 Fed., 607. It was affirmed in U. S. *vs.* Stinson, 197 U. S., 200. A like holding is found in U. S. *vs.* McLaughlin, 30 Fed., 147-161, and the holding of the Circuit Court of Appeals was affirmed in U. S. *vs.* McLaughlin, 127 U. S., 428; see also Clark *vs.* U. S., 95 U. S., 539.

State *vs.* Jackson R. R. Co., 69 Fed., 116.
State *vs.* Milk, 11 Fed., 389.
State *vs.* Flint Co., 51 N. W., 103.
Cahn *vs.* Barnes, 5 Fed., 326.
Gibbons *vs.* U. S., 5 Ct. of Claims, 416.

"A person bound by equitable estoppel, persons in privity are likewise bound."

See—

2 Pom. Eq. (3d Ed.), sec. 813.
Peters *vs.* Jones, 35 Ia., 512.
Cahn *vs.* Barnes, 5 Fed., 326.
Knevels *vs.* R. R. Co., 62 Fed., 224.
Bausman *vs.* Eads, 48 N. W., 769.
Deering Co. *vs.* Patterson, 77 N. W., 568.
In re McKeag, 99 Am. St., 80.
Portis *vs.* Hill, 98 Am. Dec., 481.
McCravy *vs.* Remsen, 54 Am. Dec., 194.

ARGUMENT.

(Proposition I.)

Our first proposition that "the plaintiff in error being in actual possession of the land in controversy under the claim of right in good faith made, and the defendant in error with full knowledge of such possession and claim, having wrongfully invaded such prior actual possession, initiated no right under the homestead law, and he cannot maintain his counterclaim," calls for an examination of the record to ascertain whether, in fact, the plaintiff in error has met the essential requirements asserted in that proposition. The stipulation of facts puts these matters largely beyond controversy. Up to 1884 the land was open and unoccupied. In 1884 Fitzgerald went upon it and broke up a few acres, and in 1885 took possession, broke up more, and continued to occupy and farm this land, his possession being entirely undisputed until the spring of 1888. In the spring of 1888 Fitzgerald entered into a written lease with the railroad company, and continued to farm the land as its tenant. In September, 1888, Ellen M. Childs purchased the land from the railroad company, made a cash payment, and agreed to pay the balance upon terms. Fitzgerald continued as the tenant of Childs until October 8, 1889, when Childs sold to the plaintiff in error Logan for full value, being $140 more than her purchase price from the railroad company, and Fitzgerald continued as the tenant of Logan. The defendant in error in the spring of 1890 with a gang of men and teams, and while Fitzgerald was in possession, forcibly went upon the land, plowed it up and put it to crop. It is stipulated that "at the time defendant in error entered upon the property in controversy and broke up the same in the spring of 1890, he knew that the same was in the possession of John Fitzgerald, who had been the tenant thereon, and had farmed and cultivated same during the year 1889

as tenant of said Ellen M. Childs; that said Ellen M. Childs had sold said land to plaintiff in 1889, Fitzgerald becoming thereupon the tenant of the plaintiff in error; that said land was claimed and had for many years been claimed by the Sioux City & St. Paul Railroad Company as and for a part of its grant; that said land had been declared to belong to said Sioux City & St. Paul Railroad Company by the U. S. Court in the case between said company and the Milwaukee Company; that in said suit same had been set off to said Sioux City & St. Paul Railroad Company as its property; that said company had for many years claimed that it had earned said land and was entitled thereto; that at that time and for many years prior thereto the officers of the Land Department of the United States had refused to recognize applications to file thereon under the homestead laws; and that said officials claimed that said land and other lands of its class were not subject to entry for reasons heretofore stated."

In addition to this, the plaintiff in error, Logan, gave testimony showing clearly his good faith in the premises and that he bought for full value, relying upon the title of the railroad company. The Secretary of the Interior with the question directly presented found Logan to be a *bona fide* purchaser. The finding of the Secretary of the Interior in that matter upon the single question of Logan's good faith ought to be, and we believe is, conclusive.

We desire now to invite the attention of the court to the opinion of the Supreme Court of Iowa and to point out the errors into which that court apparently fell. The opinion will be found in the 147 Iowa, at page 442. As we have stated, the Supreme Court of Iowa affirmed the decree of the District Court, holding, first, that the plaintiff in error was not in fact a good-faith purchaser within the meaning of the act of March 3, 1887; and, second, that notwithstanding defendant in error's original possession was obtained by a trespass, he had acquired a right to hold said land under

the homestead laws of the United States. Referring first to that court's holding upon the question of good faith, it is said, beginning upon page 451: "The railroad company had no title to the land in controversy when it leased it to Fitzgerald nor when it contracted to sell it to Ellen M. Childs in September, 1888. The company undoubtedly knew that it had no right to the land in controversy, and hence its acts were clearly not in good faith."

It will be observed here that the court gives prominent consideration to the invalidity of the railroad's claim, apparently overlooking the fact that the very purpose of the act of March 3, 1887, was to deal with lands to which the railroad's title had failed. The court seems also to have assumed that good faith upon the part of the railroad company was an essential. This assumption was wholly unwarranted. "It is not required that the sale by the railroad companies shall have been made on its part in good faith, but only that the purchaser shall have bought in good faith."

U. S. *vs.* Southern Pacific R. R. Co., 184 U. S., 57.

The Iowa Supreme Court further said: "When the plaintiff took an assignment of the Childs contract, he knew of the suit that had been brought by the United States to quiet title to the unearned and unpatented lands, and that the land in controversy was included therein. He is presumed to have known the terms of the grant and the character of the railroad's title, and he at least legally knew that it had absolutely no title. His agreement of October 8, 1889, with the railroad company furnishes abundant evidence of his complete knowledge of the whole situation."

The statement last quoted is remarkable for its inaccuracies. There is not a scintilla of evidence to show that when the plaintiff took the assignment he knew of the existence of the suit referred to. The agreement recited to have been of October 8, 1889, was in fact executed on March 13, 1894.

The Iowa court further says: "After the defendant had taken possession of the land in 1890, the plaintiff made no move to regain possession, and so far as the record shows, made no claim thereto until this action was commenced." The quoted statement is made in the very light of the fact that plaintiff in error's struggle for the land through the various departments of the Government had continued for more than five years immediately preceding the commencement of the action.

The Iowa court further says: "From all of these facts and circumstances we think it must be said that the plaintiff was not a purchaser in good faith. Good faith in general means without notice as well as for a valuable consideration." Now, we urge not only that "all of these facts and circumstances" are utterly without support in the record, but that the final conclusion as to the elements essential to constitute good faith is unsound. The opinions of this court in U. S. *vs.* Winona Railroad Company, 165 U. S., at page 477, and U. S. *vs.* Southern Pacific Railroad, 184 U. S., show that absence of notice is not required. The very lucid reasoning of Mr. Justice Brewer in the former case proves very conclusively that the matter of notice does not enter into the question.

The Iowa court further says: "In Knepper *vs.* Sands, *supra*, it was held that as the 4th section of the adjustment act of 1887 had no reference to unearned lands purchased after the date of that act, a purchaser thereafter could not become one in good faith within the meaning of the act." The Iowa court must have made a very superficial examination of the opinion in Knepper *vs.* Sands to arrive at any such conclusion. The case of Knepper *vs.* Sands was submitted upon two certified questions; the first question the court declined to answer. The second question was in substance simply this: "Can Knepper, the appellant, be esteemed a purchaser in good faith, or a *bona fide* purchaser of the land in controversy within the meaning of the fourth

section of the adjustment act of March 3, 1887, *as against John A. Sands, the appellee, who was in the open possession of the land in controversy and had erected valuable improvements thereon in manner and form aforesaid when said purchase was made.*" This question the court answered in the negative, but it would be wholly unwarranted to say that the court "held that as the 4th section of the adjustment act of 1887 had no reference to unearned lands after the date of that act, a purchaser could not become one in good faith within the meaning of the act." The court did not say *a purchaser* thereafter could not become one in good faith within the meaning of the act. The court said, "*the appellant* could not, within the meaning of the act and after its passage, become a purchaser in good faith of the *lands here in dispute.*" This distinction exists between the Knepper *vs.* Sands case and the case at bar: In Knepper *vs.* Sands, Sands, the appellee, was in the open possession of the land in controversy and had improved it when Knepper made his purchase. In the case at bar, the railroad was in the undisputed possession of the land in controversy through its tenant holding under its written lease when the purchase was made. When the court said that *the appellant* could not become a purchaser in good faith, the court spoke in the light of the conditions involved within the question submitted, and not in consideration of only part of those conditions.

We believe that this case should be determined by the rule laid down in Atherton *vs.* Fowler, 96 U. S., 213, and approved in Lyle *vs.* Patterson, 228 U. S., 211, and other cases.

(Proposition II.)

The plaintiff in error urges the soundness of his second proposition, "that the plaintiff in error having purchased the land in good faith while it was in the undisputed possession of the railroad company, and before any attempt was made to initiate any homestead right by settlement, im-

provement, or taking possession, was entitled to protection under the act of March 3, 1887, even though the purchase was made after the passage of said act." In support of this proposition we have cited U. S. *vs.* Southern Pacific Railroad. It seems to us that this court squarely held in that case that section 5 of the act of March 3, 1887, applied to purchases made after the passage of the act; and it seems equally clear that the reasoning of that case supports the proposition that sections 2 and 4 are applicable to purchases in good faith made after the passage of the act, and there would seem to be no good reason for preferring any of the classes of cases enumerated in these respective sections over the classes enumerated in other sections. Had it not been for the unfortunate choice of language used in expressing the opinion of the court in Knepper *vs.* Sands, the opinion in the Southern Pacific case would seem to make the position of the court quite clear upon the question under discussion. It will no doubt be contended by counsel for the defendant in error that the case of Knepper *vs.* Sands establishes a rule contrary to that for which we contend. When one analyzes carefully the question there submitted and answered, and considers the language of the court in the light of and as connected with the submitted question, the opinion in Knepper *vs.* Sands can be readily reconciled with the holding of the court in the Southern Pacific case. The question submitted was in the following language:

> "Second. In view of the terms of the granting act of May 12, 1864, and the action subsequently taken in manner and form aforesaid by the State of Iowa, acting through its Governor and Legislature, can *Elmira Knepper, the appellant*, be esteemed a purchaser in good faith or a *bona fide* purchaser of the land in controversy, within the meaning of the fourth section of the adjustment act of March 3, 1887, *as against John A. Sands, the appellee*, who was in the open possession of the land in controversy and had erected valuable improvements thereon, in manner and form aforesaid, when said purchase was made?"

Divested of its preliminary language, the question was: "Can Elmira Knepper, the appellant, be esteemed a purchaser in good faith * * * as against John A. Sands, the appellee, who was in the open possession of the land * * * when said purchase was made?" This concrete question involved two distinct sets of conditions, namely, the conditions pertaining to the conduct of Elmira Knepper in connection with her purchase, and the conditions pertaining to the conduct of John A. Sands in connection with his possession and claim. A consideration of both of these sets of conditions was essential to a true answer.

This court, after stating the question, said:

> "We have seen that the appellant claims an interest in the lands here in question in virtue of a purchase made by her from the railroad company, June 21, 1887, *after* the passage of the adjustment act of March 3, 1887. But what interest had the company at that time in these particular lands constituting a part of the 85,457.41 acres of unearned lands, no part of which the company earned or could have earned except on account of road actually constructed by it. For such road as the company had constructed, lands had been conveyed to it, and there never was a moment, according to the record, when the company in consideration of constructed road; the State a conveyance or patent for the lands here in dispute or for any of the unearned lands. The legal title to the lands granted by the act of 1864 was, first in the United States, next in the State (Sioux City, &c., Railroad Co. *vs.* United States, above cited), but never in the company until a conveyance to it by the State. The State could only have conveyed lands to the company in consideraiton of constructed road; and subject to that condition the company undertook to construct the road When it abandoned the work of construction it lost the right to claim lands except for such road as it had previously constructed. The State therefore properly resumed, as by the act of 1882 it did resume, after the company's default, such title to the unearned lands as it had before authoriz-

ing the company to construct the road. The State after thus resuming the title could have used the unearned lands to aid in the construction of that portion of the road which the railroad company failed to construct. But it did not do so, and hence by the act of April 2, 1884—eighteen years after it accepted, in 1866, the grant of 1864 and the completion of the road having been abandoned—the State, by statute, formally relinquished to the United States all its right, title, and interest in the unearned lands pertaining to the Sioux City and St. Paul Railroad Company. This statute was perhaps unnecessary, as by the act of 1864 the title to the unearned lands granted by that act was to revert to the United States after the expiration of fifteen years from the acceptance of the grant without the completion of the road. But the relinquishment by the State saved the necessity, if there was a necessity, of formal proceedings, legislative or judicial, by the United States to reinvest itself with full title. Thus the title to the unearned lands was put back into the United States. So that when the adjustment act of 1887 was passed, the title of the United States to the unearned lands, including the particular lands here in dispute, was complete and perfect. No interest then remained in the State or in the railroad company requiring an adjustment; for, as stated, the State had relinquished all its claim, and the railroad company had received all the lands it was entitled to demand for constructed road. When, therefore, Congress made provision in the fourth section of the act of 1887 for the protection of those who in good faith had purchased from any 'grantee company,' to whom lands had been erroneously certified or patented, it could not have intended to refer to purchases made from the railroad company, after that act took effect, of lands originally certified or patented to the State and not to the railroad company, and the legal title to which was in the United States at the date of passage of the act."

We now ask the indulgence of the court while we subject certain portions of the act of March 3, 1887, and also the language of this court just quoted, to brief analysis.

Section 2 of the act referred to provides:

"That if it shall appear, upon the completion of such adjustments respectively, or sooner, that lands have been, from any cause, *heretofore erroneously certified or patented by the United States, to or for the use or benefit of any company* claiming by, through, or under the grant from the United States, etc."; then follows a provision for demand for relinquishment, and in the event of failure or refusal, recovery by suit.

Section 4 of the act provides:

> "That as to all lands, except those mentioned in the foregoing section (section 3) which have been *so erroneously certified or patented as aforesaid*, and which have been sold by the *grantee company* to citizens of the United States, or to persons who have declared their intention to become such citizens, the person or persons so purchasing in good faith, his heirs or assigns, shall be entitled to the land so purchased upon making proof, etc."

At the time that the act in question was passed, a dispute existed between the Government and this and other railroads with respect to the amount of lands earned under this and other grants of like character, and it was then known that the various railroad companies had sold a large amount of the lands claimed by them under their respective grants and were constantly selling more, and that good-faith purchasers from the railroad companies were likely to suffer by reason of the failure of the railroads' title. The purpose of the act was to provide for the adjustment of these disputes and in so doing to extend protection to good-faith purchasers from the companies. In effecting this purpose, Congress undertook to prescribe the rule which should govern the officials of the Government in extending such protection. The rule prescribed fixes, first, the time within which the claims of the purchasers from the railroad may be recognized, namely, "upon the completion of such

adjustments, respectively, or sooner"; second, the status of the lands to which claims shall be recognized, namely, lands "heretofore erroneously certified or patented by the United States, to or for the use or benefit of any company claiming by, through, or under the grant, and which have been sold by the grantee company to citizens of the United States, or to persons who have declared their intentions to become such citizens"; third, the status of the purchaser who is entitled to protection, namely, "the person or persons so purchasing in good faith, his heirs or assigns."

Now, applying the rule of the act to the instant case, we find each of these requirements fully complied with. Plaintiff in error's claim was presented and recognized by the officials of the Government before the completion of such adjustment of the grant. The land had been erroneously patented by the United States for the use and benefit of a company claiming by, through, and under the grant. The land had been sold by the grantee company to a citizen of the United States, and such citizen had purchased in good faith.

The criticism which we have to offer of the language employed by the learned justice who wrote the opinion in Knepper *vs.* Sands is that it seems to make almost of the essence of the decision the matter of the date of purchase, whereas the real question involved in that case was the matter of good faith. No provision of the act of March 3, 1887, is pointed out, either expressly or impliedly, requiring that the purchase referred to be made prior to the passage of the act, and no such provision exists. The only requirement as to time relates to the patenting of the land. Sections 2 and 4 of the act do require that the lands must have been "heretofore erroneously certified or patented by the United States."

In the opinion at the top of page 485, this language is used: "When, therefore, Congress made provision in the fourth section of the act of 1887, for the protection of those who in good faith had purchased from any 'grantee com-

pany,' to whom lands had been erroneously certified or patented, it could not have intended to refer to purchases made from the railroad company, after that act took effect, of lands originally certified or patented to the State and not to the railroad company, and the legal title to which was in the United States at the date of passage of the act." This language implies that the fourth section of the act merely affords protection to those purchasing from a company to whom lands had been erroneously certified or patented, whereas the section includes those purchasing from a company for the use or benefit of which lands have been certified or patented. The further statement, "it could not have intended to refer to purchases made from the railroad company, after the act took effect, of lands originally certified or patented to the State and not to the railroad company, and the legal title to which was in the United States at the date of the passage of the act," makes unduly prominent the idea of time of purchase, while the essential idea in that connection, as really embodied in the question certified, is that of the appellee being in the open possession of the land with his improvements when the purchase was made, in other words, the idea of good faith, for a purchase could not be made in good faith on lands in the actual and open possession of another at the time. The opinion, however, in Knepper *vs.* Sands, taken as a whole, does recognize the element of good faith as the controlling matter. The fact that Sands was in the open and actual possession of the land at the time of the purchase was the controlling fact in that case. That fact is clearly recognized as an essential in the concluding paragraph of the opinion, when the court said: "the *appellant* could not, within the meaning of the act, and after its passage, have become a purchaser in good faith of the lands here in dispute." The "appellant" was one who purchased while the appellee was in the open and actual possession of the lands under claim of right, and under numerous decisions of this court his purchase could not be regarded as a good faith purchase.

The opinion in Knepper vs. Sands seems also to give undue prominence to the thought that the title to the land was in the United States at the date of passage. Of course it is true that by the terms of the grant, after the prescribed limit of time, unearned lands would revert to the United States, but the very matter sought to be adjusted by the act of March 3, 1887, was the dispute as to whether some of the lands had been earned. It is quite clear, then, that the mere provision that the lands should revert would be of no protection to the purchaser who did not know that the lands had not been earned. The court also refers to the act of the Iowa Legislature in resuming the unearned lands, but this act was equally general and indefinite. The passage of that act did not determine what lands were earned and what lands were not earned; it was no more specific than the provision of the original grant. True, the Iowa Legislative act of 1884 required the Governor of the State to certify to the Secretary of the Interior all lands which had theretofore been patented to the State, and which had not been patented by the State to the railroad, and further provided that "the list of lands so certified by the Governor shall be presumed to be the lands relinquished and conveyed by section 1 of this act." Now, under these provisions of the Legislative act referred to, there would be some ground for contention that the purchaser had record notice of the fact that the title to this specific land was in the United States. But the Iowa Legislative act contained the further provision, immediately following that last quoted: "Provided that nothing in this section contained be construed to apply to lands situated in the counties of Dickinson and O'Brien." Now, the land in question is situated in O'Brien County, and so expressly excepted from the provision of the act of the Iowa Legislature under discussion. It was not certified by the Governor to the Secretary of the Interior, and no record evidence existed of the fact that the title had revested in the United States. Such evidence did not exist until the final decree, in the case brought by the United States against the railroad to recover this land, in 1895.

(Proposition III.)

> "All of the circumstances and conditions being such that the plaintiff in error would be entitled to protection under the act of March 3, 1887, had his purchase dated prior to the approval of that act, and the United States Government having treated said act as applying to the plaintiff in error's purchase, and having invited the plaintiff to an adjustment of his claim under that act, and having adjusted such claim and received the full purchase price from the plaintiff in error and issued to him its patent, the United States Government is now estopped from denying the validity of such patent, and the defendant in error, claiming in privity with the United States Government, and with notice and knowledge of the acts of the United States when he proffered his homestead filing on February 27, 1896, is also estopped."

It would seem that the mere stating of the above proposition carries its own proof so far as the Government of the United States is concerned. Are there any circumstances peculiar to this case that relieve the defendant in error from the force of the rule that he, claiming under the United States, is precluded by the conduct of the United States Government? The land in question was at no time open to homestead entry prior to the date defendant in error filed upon it. When the Commissioner of the General Land Office on November 18, 1895, by letter approved by the Secretary of the Interior, directed the restoration to public entry of the lands embraced in the decree of the Supreme Court, such restoration was to take place "on a date to be fixed which should be ninety days after first publication of notice thereof, which notices should include a notice to all persons claiming under act of Congress of March 3, 1887, as purchasers from the Sioux City Company of any of said lands, to come within said ninety days and give notice of their claims." Said notice was duly published and February

27, 1896, fixed as the date upon which said lands would be restored to public entry. The plaintiff, during said ninety days prior to February 27, 1896, published the notice, as required, of his intention to make proof of his rights to the land under the act of March 3, 1887, and filed his application to make such proof on January 7, 1896. When the defendant in error appeared at the office of the Register and Receiver on February 27, 1896, he knew that the land had not been open to entry before that date, and that its restoration on that date had been by the Government declared to be subject to the plaintiff in error's proof of purchase in good faith. The defendant in error when he filed on February 27, 1896, had no claim to the land in question that was entitled to protection and if the Government had concluded itself by its course of conduct, there were no equitable circumstances which entitled defendant in error to any peculiar consideration. He was not and never had been an actual settler on the land; he had not taken possession while it was a part of the public domain, unoccupied and open to settlement. He had unlawfully invaded the prior, actual and good-faith possession of another, and was striving to maintain his hold upon the land as against both the attitude of the plaintiff in error and the Government. Under these circumstances, we respectfully submit that he stands in no better position than the Government would stand were it now attempting to recover the land from the plaintiff.

Respectfully, submitted,

W. D. BOIES,
WILLIAM MILCHRIST, AND
GEO. C. SCOTT,
Solicitors for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 247.

SCOTT LOGAN, PLAINTIFF IN ERROR,

vs.

W. R. DAVIS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

REPLY BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

PLAINTIFF IN ERROR'S REPLY.

1.

(The Federal Question.)

Defendant in error urges that no Federal question is presented on the record in this case. It is his position that the State courts decided the case upon general principles of law wholly independent of any law of the United States. It is pointed out on page 23 of defendant's brief that the Iowa

Supreme Court said that it deemed it unnecessary to determine whether the land in controversy was subject to the Adjustment Act of March 3, 1887. The language of the Iowa Supreme Court is there quoted as follows:

> "In view of the conclusion we reach on other matters presented *we deem it unnecessary to determine whether the land in controversy was subject to the Adjustment Act of March 3, 1887.* * * * The controlling question, as we view it, is whether the plaintiff was a purchaser in good faith within the meaning of the Adjustment Act of March 3, 1887. And, to determine whether he was or was not such a purchaser, it may be well to summarize the facts bearing thereon."

It will be noted that the Iowa court says: "We deem it unnecessary to determine whether the land in controversy was subject to the Adjustment Act of March 3, 1887." The court, after stating other matters, proceeds: "The controlling question, as we view it, is whether the plaintiff was a purchaser in good faith *within the meaning of the Adjustment Act of March* 3, 1887." (The italics are ours.) Now, while the Iowa court says in one place that it deems it unnecessary to determine whether the land in controversy was subject to the Adjustment Act of March 3, 1887, that court assumes that the land in controversy was subject to the Adjustment Act as the very foundation of the question which it did consider controlling. How could the question whether the plaintiff was a purchaser in good faith within the meaning of the adjustment act referred to become controlling unless the land was subject to adjustment under that act.

The plaintiff in error is claiming in this case under a patent from the United States. At the very outset that title is plead. Conformable to the Iowa statute, in his action in ejectment plaintiff plead his abstract of title; at that time the record of title only showed his final receipt, but that final receipt showed payment for the land under the provisions of certain acts of Congress, and that patent was ordered.

The defendant in his answer and counter-claim challenges the validity of the patent of the United States, and that challenge is met by the plaintiff's reply, clearly putting in issue the question of the validity of the patent, the construction of the acts of Congress referred to, and whether the plaintiff's conduct has brought him within the provisions of those acts, and again whether the defendant in error's conduct has brought him within the provisions of the acts of Congress pertaining to homesteads. The Supreme Court of Iowa passed upon these Federal questions. It held the patent of the United States void. It held that the plaintiff in error was not a purchaser in good faith within the meaning of the act of Congress of March 3, 1887. It held that defendant in error had legally initiated a homestead right under the acts of Congress; all of these holdings directly in response to issues joined, and error has been assigned upon each of them.

2.

(The Question of Good Faith.)

Counsel for defendant in error, in discussing the question of the good faith of plaintiff's purchase, seems to assume that in order that such good faith might exist the railroad company must have had some title at the time of the purchase. Considerable time and space are given to an attempt to show that before the time of the purchase it had been determined that the railroad company had not earned the land, and that title had revested in the United States. It is possibly true that title had revested in the United States; but, as we pointed out in plaintiff's opening brief, nothing existed of record anywhere to indicate that this particular piece of land was among the lands not earned by the railroad company. The lands in Dickinson and O'Brien counties were particularly excepted from that provision of the act of the Iowa legislature which declared that "the list of

lands so certified by the Governor shall be presumed to be the lands relinquished and conveyed by section one of this act." Now, in view of this exception, plaintiff could not even conjecture that the particular tract of land in controversy would finally turn out to be a part of the lands not earned. This land was within the granted limits and opposite a completed ten mile section of the road. This particular land had, in fact, been earned; but inasmuch as the railroad company had disposed of more than its share of lands lying in the indemnity limits, the Government recouped by laying claim to the undisposed of lands within the granted limits. Counsel for defendant in error contend that plaintiff had constructive notice of all the historical facts connected with and following the grant in question, and that such notice is inconsistent with his claim of good faith purchase. In our opening brief we pointed out the reasons why the rule of constructive notice are not applicable here, and the authorities supporting our contention (Plaintiff's Brief, pp. 20, 21). We contend that the question of notice does not enter into the case. Neither does the question of whether the title had actually revested in the Government. The question simply is, Did plaintiff in error in good faith purchase the land? The Secretary of the Interior, whose duty it was to pass upon that question, held that he did. There is no evidence in the record tending to show that such purchase was not made in good faith, and the only reasons assigned by the Supreme Court of Iowa against such good faith were based, first, upon a clear misconception of undisputed facts and a clear misconception of the rule of law which ought to have controlled the court

3.

(The Homestead Entry.)

Counsel asserts that defendant in error made settlement on the land and tendered his findings and fees in conformity to the law. Of course counsel is mistaken in this. There was no settlement on the land in controversy. Defendant in error was a squatter upon an adjoining eighty acres at a time when the homestead laws only permitted homesteading of eighty acres. The only act done by the defendant in error prior to filing upon the land in controversy was to forcibly invade the prior actual possession of the plaintiff in error and maintain his possession thus acquired. The stipulation of facts in this case puts this matter entirely at rest (Transcript, page 38, paragraph 50)

> "That defendant herein at no time has lived upon, nor had any buildings upon the property in controversy, nor enclosed the same by fence, except that part of the land that is used for pasture, being about 20 acres, and being partly on both the north and south eighties."

We have no quarrel with the rules of law laid down in the cases cited under this division of defendant's brief whenever a case arises to which they ought to be applied; but we submit that they are not applicable to the case of a man who, knowing that another is in possession of public land under claim of right, forcibly wrests that possession from him.

True, counsel for defendant in argument contends that "neither the plaintiff in error nor his assignor ever had possession of more than a few acres of the tract in controversy, and that possession was only of a transitory nature." The trouble with this contention is that it has not the support of the record. The stipulation of facts says (Transcript, paragraph 46, page 37):

> "That at the time she (Mrs. Childs) so purchased said land the same was in the actual possession of Fitzgerald as tenant of the Sioux City Co.; that said company's possession through said tenant was undisturbed and undisputed, and said company sold said land to Ellen M. Childs as a part of the grant under said act of Congress of May 12, 1864, delivered possession thereof to her through the possession of its tenant, said Fitzgerald, and she continued in the uninterrupted and undisturbed possession thereof, through said tenant, until October 8, 1889, at which time she sold said property to plaintiff."

On page 41 of transcript, paragraph 62, the stipulation says:

> "That at the time defendant entered upon the property in controversy and broke up the same in the spring of 1890, he knew that the same was in the possession of John Fitzgerald, who had been the tenant thereon, and had farmed and cultivated same during the year 1889 as tenant of said Ellen M. Childs; that said Ellen M. Childs had sold said land to plaintiff in Oct., 1889, Fitzgerald becoming thereupon the tenant of plaintiff and moving off the land in March, 1890; that said land was claimed, and had for many years been claimed, by the Sioux City Co., as and for a part of its grant," etc.

Again, on page 58, defendant's counsel states under quotation as follows:

> "From the time that the defendant took possession of the whole tract in 1890, down to the date of the trial, the plaintiff in error 'made no move to regain possession, and, so far as the record shows, made no claim thereto until this action was commenced.'"

The quotation used by counsel is from the opinion of the Iowa Supreme Court, and, as we pointed out in our opening brief, the statement is absolutely erroneous, without a particle of foundation in the record, but against the undisputed

fact that for five years prior to the commencement of the action plaintiff in error had been struggling through the departments of the Government to maintain his hold upon the land.

Respectfully submitted,

W. D. BOIES,
WILLIAM MILCHRIST, AND
GEORGE C. SCOTT,
Solicitors for Plaintiff in Error.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1913

No. 247

SCOTT LOGAN, PLAINTIFF IN ERROR,

vs.

W. R. DAVIS.

IN ERROR FROM THE SUPREME COURT OF THE STATE OF IOWA.

Brief and Argument for Defendant in Error.

MADISON B. DAVIS AND
EDWIN J. STASON,
Solicitors for Defendant in Error.

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SUPREME COURT OF THE UNITED STATES

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SCOTT LOGAN, PLAINTIFF IN ERROR,

vs.

W. R. DAVIS.

IN ERROR FROM THE SUPREME COURT OF THE STATE OF IOWA.

Brief and Argument for Defendant in Error.

Nature of the Action.

This action was commenced by the plaintiff in error as an action at law for the recovery of real property under the Iowa law, but was, on motion of the defendant, transferred to the equity side of the calendar and there tried as an action in equity, and a decree was entered for the defendant on his counterclaim. It was tried de novo on appeal to the state Supreme Court, and the decree of the trial court was there affirmed.

The Issues.

The statement of the issues by counsel for plaintiff in error are not regarded as being sufficiently definite. Liberty is, therefore, taken to state them more fully, and to a large extent in the words of the pleaders.

In his petition the plaintiff in error alleged simply that he was the owner of the land in controversy, and entitled to the immediate possession thereof, and asked judgment for the possession and for damages.

The defendant in his answer admitted that he was in possession of the land, denied that the plaintiff was the owner or entitled to the possession, and set up an equitable defense and counterclaim, alleging that he was the absolute and unqualified owner of the land by reason of the fact that in 1896 he had made application to enter the land as a part of the public domain under the homestead laws of the United States, alleging settlement, residence and cultivation since 1886, and full compliance with the law relating to such entries; that the application was contested by the plaintiff in error, who made claim to the land as a purchaser thereof, as land grant land, from the Sioux City & St. Paul Railroad Company, under the terms of the Adjustment Act of Congress of March 3, 1887, the contract of purchase being dated September 11, 1887; that on appeal from the local land office, the contest was finally decided in favor of the plaintiff in error, and a patent was issued to him under the said adjustment act; that this decision was contrary to law and void. The defendant further alleged that by reason of his long residence and cultivation of the land, and by reason of his homestead rights he was entitled to it under the homestead laws of the United States, and entitled to the patent therefor, and that the issuing of the patent to the plaintiff in error was contrary to law, and asked that the court decree that the plaintiff in error held the title in trust for the defendant, and that he be ordered to make transfer of the title to him, and that defendant have other equitable relief.

The plaintiff in error in his reply denied the allegations of the counterclaim, alleged the facts relating to the grant to the state by the United States to aid "in the construction of a railroad from Sioux City in said state to the south line of the state of Minnesota," the various acts of the state legislature with reference thereto, the facts relating to the construction of the road by the Sioux City & St. Paul Railroad Co., the litigation in the Federal courts with reference to the land, and other matters about which there is no controversy; alleged also that the land in controversy had been "earned," and that the land was purchased of the said company in good faith, under the adjustment act of 1887, by one Ellen M. Childs, September 11, 1887, the purchase being evidenced by a written contract, which was on October 8, 1889, assigned to the plaintiff in error, who finally secured the patent, and paid, for the land in May, 1901, as alleged in the counterclaim. The plaintiff in error further alleged in his reply as follows:

> "Par. 29. That by reason of the acts of the United States, as herein alleged, plaintiff, in good faith, incurred great expense in purchasing land in controversy from and through said railroad company, in procuring counsel and in paying expenses of the contest before the United States Land Department, and plaintiff, in relying upon the acts and conduct of the United States, as herein alleged, upon being awarded the said land by the Land Department, paid the full price thereof, to-wit: $216.08.
>
> "Par. 30. * * * That the United States is now estopped by reason of its acts and conduct, as detailed in Pars. 27, 28 and 29, and by reason of its acceptance and retention of the money so paid by plaintiff as the purchase price of the land in controversy from now maintaining that the plaintiff did not acquire title in fee simple to the said land, and from questioning the validity of said patent so issued to

the plaintiff and maintaining that the act of March 3, 1887, does not apply to the said grant, or to the said lands, or that the said grant had, previous to the said act, been adjusted; and the defendant being a claimant of title by, through and under the United States, and in privity with it, and his claim having originated subsequent to the purchase of the said land from the said railroad company by the plaintiff and those through whom he claims, and long after the United States had proceeded under the act of March 3, 1887, and defendant having knowledge at the time of making application to homestead said land of the matters recited in Pars. 27, 28 and 29, and of the good faith of plaintiff in making said purchase, and attempting to procure the title to the said land under the act of March 3, 1887, is likewise now barred and estopped from questioning the validity of the patent so issued to plaintiff or in any manner questioning the right, title or interest of plaintiff in or to said land, or claiming that the defendant is entitled to homestead said land."

"Par. 32. * * * That by virtue of said patent and the several acts aforesaid preceding the issuance thereof, the equitable title to said lands vested in the said railroad company and the state of Iowa held the naked legal title thereto in trust for the use and benefit of the said railroad company. That said Ellen M. Childs, and plaintiff, at the time of their respective purchases of the land in controversy, each in good faith believed that said railroad company had earned and owned said land and had fully complied with the provisions of the said grant. That they knew the facts set forth in this paragraph and the recitals in the said patent to the State of Iowa, believing said recitals to be true, and bought the land in good faith, relying thereon. * * * That they paid

the full value of said land. The defendant did not apply to homestead said land until long after they had expended their money in the purchase and improvement thereof. That while the plaintiff has received a patent for said land from the United States, under and by virtue of the Act of March 3, 1887, he avers that he was and is entitled to the said patent and said land by virture of the purchase thereof, as aforesaid, and the facts herein alleged. That the United States by reason of the facts herein alleged is, and at all times since the purchase of the said land by the said E. M. Childs, has been estopped from denying that the said lands were earned by said railroad company, that the title thereto had passed to the said company, and from claiming, or maintaining that the said lands had reverted to the United States or that plaintiff has no right or interest therein; and by reason of the facts alleged herein, and of the receipt and the retention by the United States of this plaintiff's money in payment of the full purchase price of the said land, it is estopped from questioning the validity of the patent issued to the plaintiff or the regularity of the proceeding under which the same was obtained; that the defendant claims title and interest in said land under, by and through the United States under claim of homestead right which was initiated, if at all, long after said purchase by E. M. Childs and this plaintiff, and with full notice and knowledge on his part of the rights of plaintiff as herein alleged, and of the facts herein alleged, and that he is in like manner barred and estopped from maintaining this action, questioning the title of the plaintiff or the validity of plaintiff's patent, or claiming that his title or interest in said land is superior to that of plaintiff.

"Par. 36. That said patent issued by the

United States to the State of Iowa * * * embracing the land in controversy and other lands, contained recitals as to the compliance by the said railroad company with the provisions of said grant. * * * And by reason of the said patent and the recitals therein, the United States is estopped and the defendant herein, claiming in privity with the United States, is likewise estopped from claiming, asserting or maintaining that the said land in controversy had not at said time been duly earned by the said railroad company, * * * that the said railroad company did not have good right and lawful authority to sell said land to said Ellen M. Childs; that the plaintiff did not, by his said purchase of said land, through and under said railroad company, obtain good and perfect title to said land, as against the United States, and defendant, or that this plaintiff has no right or interest in said land. That the United States and the defendant are estopped, as aforesaid, against plaintiff, who is in privity of title and estate with the said railroad company, and with said State of Iowa, grantee in said patent for the use and benefit of said railroad company. That plaintiff is entitled to and did assert and maintain title to the land in controversy through, under, and by virtue of the right and title of said railroad company, derived as aforesaid, and the purchase thereof by plaintiff, as well as upon the patent issued by the United States to the plaintiff.

"Par. 37. That the government price of $2.50 an acre, or $216.08, was paid and caused to be paid by the said plaintiff to the United States, relying upon the decisions and findings of the said Land Department that the plaintiff was a good faith purchaser of the land in controversy from the railroad company, within the meaning of the Act of March 3, 1887, and that

by reason thereof, and of the retention of the said purchase money by the United States, it is estopped, and the defendant herein, claiming in privity with it, is likewise estopped from claiming, alleging or maintaining that this plaintiff is not a good faith purchaser of said land within the meaning of the Act of March 3, 1887, or that the patent issued to the plaintiff herein is invalid, or that plaintiff's title based thereon is invalid, and that the defendant is likewise estopped in manner, form and substance, as is alleged in Par. 30 hereof; that the United States is estopped.

"Par. 38. That for many years prior to the passage of the Act of March 16, 1882, by the Legislature of Iowa, and for many years after the passage thereof, to-wit: to and including the year 1895, the State of Iowa caused to be collected from the land in controversy taxes annually levied thereon by the officers duly authorized by the State of Iowa to levy taxes, and that said State of Iowa thereby recognized that said lands were subject to taxation, and not the property of the United States, and that the same had been earned by the said railroad company, and that said company was entitled thereto, and thereby recognized and construed the said Act of March 16, 1882, as not applying to the land in controversy and that plaintiff and his grantor were entitled to rely upon the said Act of the State of Iowa, and said recognition by said State that said lands had been earned, and the said construction thereby placed by the State upon said Act of the Legislature, and this plaintiff and said Ellen M. Childs knew of said facts and did rely thereon in their said purchases of said land, and the said State of Iowa, having placed said construction upon said Act, the same is binding upon all persons, including the defendant in this action.

"Wherefore the plaintiff asks that his title to the land in controversy be quieted as against the defendant, and that the cross-petition of the defendant be dismissed, and for general equitable relief."

Defendant's Statement of Facts.

The statement of facts in the brief of plaintiff in error is not deemed sufficiently specific, or detailed, with reference to the facts bearing upon the issue as to good faith and estoppel. We therefore add the following by way of correction and supplement:

The land in controversy is within the limits of the grant by Act of Congress, approved May 12, 1864, granting lands to the State of Iowa, "for the purpose of aiding in the construction of a railroad from Sioux City, in said state, to the south line of the State of Minnesota at such point as the said State of Iowa may select, also to said state, for the use and benefit of the McGregor Western Railroad Company for the purpose of aiding in the construction of a railroad from a point at or near Main Street, South McGregor, in a westerly direction * * * until it shall intersect with the said road running from Sioux City to the Minnesota State line," the said grant being of every alternate odd numbered section for ten sections in width on each side of the roads and the act providing that "the lands hereby granted shall be subject to the disposal of the Legislature of Iowa for the purposes aforesaid." * * * "When the Governor shall certify to the Secretary of the Interior that any section of ten consecutive miles of either of said roads is completed, * * * then the Secretary of the Interior shall issuse to the state patents for one hundred sections of land for the benefit of the road having completed the ten consecutive miles as aforesaid," etc. "Provided further, That if the said roads are not completed within ten years of their several acceptance of this grant the said lands hereby granted and not patented shall revert to the

State of Iowa for the purpose of securing the completion of the said roads within such time, not to exceed five years, and upon such terms as the state shall determine: And provided further, That said lands shall not in any manner be disposed of or incumbered except as the same are patented under the provisions of this act; and should the state fail to complete the said roads within five years, after the ten years aforesaid, then the said lands undisposed of as aforesaid shall revert to the United States." (Transcript, p. 21-22.)

This grant was accepted upon the terms, conditions and restrictions contained in said Act of Congress, by the State of Iowa, by the act of legislature entitled "An Act to accept of the Grant and to carry into Execution the Trust conferred," etc., approved April 3, 1866, (ch. 134, Acts 11 G. A.) by which "So much of the lands, interests, rights, powers and privileges, as are or may be granted and conferred in pursuance of the Act of Congress aforesaid for the purpose of aiding in the construction of a railroad from Sioux City in the said state to the south line of the State of Minnesota * * * be and are hereby disposed of, granted and conferred upon the Sioux City & St. Paul Railroad Company." * * * (Transcript, p. 23.)

The grant was also accepted by a second act entitled "An Act to Accept the Grant of Land to the State of Iowa, made by Act of Congress, May 12, 1864, and to carry out the Provisions of said Act," approved April 20, 1866, (ch. 144, Acts 11 G. A.) providing that "Whenever any lands shall be patented to the State of Iowa, in accordance with the provisions of the said Act of Congress, said lands shall be held by the State in trust for the benefit of the Railroad Company as shall be ordered by the Legislature of the State of Iowa at its next regular session, or at any session thereafter." (Transcript, p. 23.)

The Sioux Company accepted the provisions of the Act of Congress of May 12, 1864, by a resolution of its board of directors, dated September 19, 1866 (Transcript, p. 23), located its line of road, filed its map of

definite location, which was accepted by the Secretary of the Interior as the basis of the adjustment of the grant, and on August 26, 1867, under directions from the Commissioner of the General Land Office, the Register and Receiver of the local land office withdrew from sale, or other disposal, all the odd numbered sections within the twenty-mile limits of said Sioux City & St. Paul Railroad, as shown on the map of definite location. (Transcript, p. 24.)

During the year 1872 the company constructed 56 1-4 miles of track from the Minnesota line south to Le Mars, in Plymouth County, Iowa, a point about 24 miles from the Sioux City terminus, and the construction of five ten mile sections of the road was certified to the Secretary of the Interior, and under different dates the secretary caused to be issued "to the State of Iowa for the use and benefit of the Sioux City & St. Paul Railroad Company" patents for land selected by it, including the land in controversy, amounting to 407,870.21 acres. (Transcript, pp. 24, 25, 26.)

After patents had thus been issued to the state for 396,838.80 acres, the legislature of the state passed an Act, approved March 13, 1874, providing that "the Governor of the State of Iowa be and is hereby authorized and directed to certify to the Sioux City & St. Paul Railroad Company any and all lands which are held by the State of Iowa in trust for the benefit of the said railroad company," in accordance with the provisions of Section 2 of the Act of April 20, 1866, providing that: (Transcript, p. 27.)

"Whenever any lands shall be patented to the State of Iowa in accordance with the provisions of the Act of Congress, said lands shall be held by the state in trust for the benefit of the railroad company as shall be ordered by the legislature of the state."

Pursuant to the said act of the legislature, the state certified or patented to the Sioux City Company lands, not including the land in controversy, as follows: Within the granted limits, 186,186.77 acres and within the indemnity limits, 136,244.04 acres, making a total of 322,412.81 acres.

On the 30th of November, 1878, the Chicago, Milwaukee & St. Paul Railway Company, the successor of the McGregor Western Railway Company, completed the construction of its road to Sheldon, Iowa, intersecting the line of the Sioux City & St. Paul Railroad Company, and on April 7, 1879, commenced an action in the Circuit Court of the United States for the Northern District of Iowa, against the latter company for the purpose of determining the title to the land within the overlapping limits, with the result that there was decreed to the Milwaukee company lands, which had been patented to the St. Paul company by the state, to the amount of 41,687.582 acres, and lands, which had not been patented by the state, amounting to 37,747.89 acres, and the decree was subsequently affirmed by this court. (Transcript, p. 28.)

The Sioux City Company never constructed its line of road from Le Mars to Sioux City, a distance of 24 miles, and the state never caused that portion of the road to be completed and never certified or patented to the Sioux City Company or any other, the lands in controversy, for the purpose of completing said portion of the line. (Transcript, p. 29.)

While the suit between the two railroad companies was pending the Legislature of the State of Iowa passed an act (ch. 107, Acts of 19 G. A.), approved March 16, 1882, to resume all lands and rights conferred upon the Sioux City Company by the Act of Congress of May 12, 1864, said legislative act providing as follows:

"Sec. 1. That all lands and rights to lands granted or intended to be granted to the Sioux City & St. Paul Railroad Company by said Acts of Congress, and of the General Assembly of the State of Iowa, which have not been earned by the said railroad company by a compliance with the conditions of the said grant, be and the same are hereby absolutely and entirely resumed by the State of Iowa, and that the same be and are absolutely vested in said state as if the same had never been granted to said railroad company." (Transcript, p. 29.)

March 27, 1884, another act was passed by the legislature of the state, and approved, Sections 1 and 2 of which act are as follows:

> "Sec. 1. That all lands and rights to lands resumed and intended to be resumed by Chapter 107 of the Acts of the 19th General Assembly of the State of Iowa are hereby relinquished and conveyed to the United States.
>
> "Sec. 2. The Governor of the State of Iowa is hereby authorized and directed to certify to the Secretary of the Interior all lands which have heretofore been patented to the state to aid in the construction of the said railroad and which have not been patented by the state to the Sioux City & St. Paul Railroad Company, and the list of lands so certified by the Governor shall be presumed to be the lands relinquished and re-conveyed by Section 1 of this act. Provided, that nothing in this section shall be construed to apply to lands situated in the counties of Dickinson and O'Brien. (Transcript, pp. 29-30.)

January 12, 1887, the Governor of the State of Iowa duly certified to the General Land Office the list of lands relinquished and conveyed to the United States by the said act of the legislature, which lands had been patented to the State, but which had not been patented by the State to the Sioux City Company, the list embracing 26,117.32 acres in Plymouth, Sioux and Woodbury Counties.

On March 3, 1887, the Congress of the United States passed an act (24 U. S. Statutes at Large, p. 556) entitled "An Act to Provide for the Adjustment of Land Grants made by Congress to aid in the Construction of Railroads and for the Forfeiture of Unearned Lands, and for other purposes," which Act provides as follows:

> "Sec. 1. That the Secretary of the Interior be and is hereby authorized and directed to

immediately adjust, in accordance with the decisions of the Supreme Court, each of the railroad land grants made by Congress to aid in the construction of railroads and heretofore unadjusted.

"Sec. 2. That if it shall appear upon the completion of such adjustments respectively, or sooner, that lands have been, from any cause, heretofore erroneously certified or patented by the United States to or for the use or benefit of any company claiming by, through or under grant from the United States, to aid in the construction of a railroad, it shall be the duty of the Secretary of the Interior to thereupon demand from such company a relinquishment or conveyance to the United States of all such lands, whether within granted or indemnity limits; * * *

"Sec. 4. That as to all lands * * * which have been so erroneously certified or patented as aforesaid, and which have been sold by the grantee company to citizens of the United States, or to persons who have declared their intention to become such citizens, the person or persons so purchasing in good faith, his heirs or assigns, shall be entitled to the land so purchased, upon making proof of the fact of such purchase at the proper land office, within such time and under such rules as may be prescribed by the Secretary of the Interior, after the grants respectively shall have been adjusted." (Transcript, pp. 30-32.)

At the date of the passage of this act the situation as to the lands was as follows:

	Acres.	Acres.
Granted to the State for use of Company		407,870.21
Certified by the State to the Company		322,412.81
Uncertified lands		85,457.40

Reconveyed by the State to the United States under Act of G. A.	26,017.33	
Decreed to the Milwaukee Company	37,747.89	63,765.22
Granted but uncertified; decreed to belong to the United States by Federal Court and restored to settlement and entry, including land in controversy (Transcript p. 42).		21,692.18

In January, 1887, an application was made to the Interior Department by the settlers in O'Brien County, asking that suit be commenced and prosecuted in the name of the United States to assert title to about 55,297.21 acres of land in O'Brien County, claimed by the railroad companies, the applicants averring that neither of the companies mentioned had earned the lands, and that they, the applicants, were settlers on the lands, and they were seeking to acquire titles to the same under the land laws of the United States. Secretary Lamar, in an exhaustive opinion dated July 23, 1887, after reciting the congressional and state legislation relative to the lands, the facts relative to the acceptance of the grant, the construction of the road, the litigation between the companies, the acts of the legislature resuming and reconveying the land to the United States and the fact that after making all proper deductions there remained in the state the title to but 21,692.18 acres of patented lands, which were unearned, directed the Commissioner as follows:

> "You will please complete the adjustment of the grant in accordance with the views herein expressed, and make demand in compliance with the requirements of Section two of the Act of March 3, 1887 (24 St. 556), upon the St. Paul & Sioux City Railroad Company and upon the State of Iowa for the relinquishment and reconveyance to the United States of the 17,590.40

acres above referred to, or such quantity as the completed adjustment, in accordance with the principles herein enunciated may show to be wrongly held by the state under patents from the United States." (Transcript, p. 45.)

On August 11, 1887, the Governor of the State of Iowa was requested by the Acting Commissioner of the Land Office to reconvey the 21,692.18 acres within 90 days, and in the event of neglect or failure to make this reconveyance the matter would be reported to the Attorney General with the request to institute suit. (Transcript, pp. 44-46.)

On the 4th day of October, 1889, an action was commenced by the United States against the Sioux City Company in the Circuit Court of the United States for the Northern District of Iowa, and a judgment and decree was entered therein on December 18, 1890, quieting the title to the 21,979.85, including the land in controversy, in the United States. This decree was affirmed by the Supreme Court of the United States on appeal, October 21, 1895. (159 U. S., 349.)

On November 18, 1895, the Register and Receiver of the Land Office at Des Moines, pursuant to the order of the Commissioner, fixed February 27, 1896, as the date prior to which claimants under the act of March 3, 1887, should file their applications, and as the date prior to which persons claiming under the homestead laws should make their filings. (Transcript, pp. 33-34.)

On the 11th day of September, 1888, the plaintiff's assignor entered into a written contract with the Sioux City Company to purchase of it the tract in controversy, the contract being in ordinary form, providing for payments in installments. This contract was under date of October 8, 1889, modified, the modified agreement providing as follows: An extension of the time of payment to 90 days after the decision of the Supreme Court in the case hereafter referred to, a provision for the payment of the taxes on the part of the purchaser, and a further provision as follows:

"That in the event of a decision in the above entitled action in the United States Supreme Court adverse to said Sioux City & St. Paul Railroad Company as to the title to the said lands above described, the said parties of the second part will within 90 days thereafter surrender said original agreement and this modification thereof to the parties of the first part, at St. Paul, Minnesota, and receive therefor from the said parties of the first part, or either of them, the amount which has been paid on the said agreement on account of principal and interest mentioned in said original agreement, and the same to be received and accepted by said second parties in full settlement of all their rights under said original agreement and this modification thereof, and as a release of any and all claims suffered by said parties of the second part, their heirs, executors, administrators or assigns, by reason of the failure of the title of said parties of the first part to said land." (Transcript, pp. 7-8.)

The facts in regard to the settlement and possession of the land in controversy are as follows:

The land was wholly vacant, unoccupied, unimproved, wild prairie prior to 1884. In that year one Bierbower broke two or three furrows around the entire half section, but did not reside on the land. In the same year one Peterson broke about five acres along the south line of the land, but left during the same year and made no claim to it. During the same year one Fitzgerald, who was then living on adjacent land, broke six or seven acres in the northeast corner, and in 1885 cropped the land broken and continued in possession except as follows. (Transcript, p. 39):

In 1887, one Thomas Weir built a small house upon the south half of the northwest quarter of the section, moved into the house with his family, and cultivated a part of the land. April 1st, 1888, the defendant in error purchased of Weir his improvements and rights in the

land and moved into the house with his family, and has continued to reside therein with his family, and has farmed the land, to the present time. The same spring he went upon some breaking on the land in controversy and sowed five or six acres of oats, but when he attempted to harvest the oats Fitzgerald took possession of them, and in a suit brought by the defendant in error for the possession of the crop, and the land, the plaintiff in error won. Early in 1888 Fitzgerald entered into a written lease with the Sioux City Company for the land and remained in possession as its tenant during that year, and as the tenant of the plaintiff's assignor in 1889. May 1, 1890, the defendant in error went on the land in controversy, and broke up that part of it which had not been broken, except about 15 acres, and cropped the same, *and has ever since then continued to farm the land.* (Transcript, pp. 37-39.)

Ellen M. Childs purchased the land in controversy, as above stated, of the Sioux City Company for the sum of $1,270 and paid $88.00 of the consideration in cash, and made no other payments. October 8, 1889, she sold and assigned her contract to the plaintiff for the sum of $228, subject to the balance due the Company. The plaintiff himself testifies: "My occupation is milling; engaged in it quite extensively; am interested a little in lands, and a little in banking; I bought four pieces of this land, three quarter sections; *never undertook to take a homestead, never lived on it, never made any effort to get possession.*" (Transcript, p. 48.) "I entered into an agreement with the company that they would extend the time of payment, and they would pay my taxes. I think shortly after that the suit was begun, and while it was in litigation I was to make no payments." (Transcript, p. 49.) "*I have not paid any taxes on the land. I had an understanding with the company that on account of our not being able to get possession of the land they would pay the taxes.*" (Transcript, p. 43.)

The land was sold at the tax sale of December 2, 1889, and the sale canceled by the auditor under Sec-

tion 1452 of the Code. It was sold for the taxes of 1889 and 1890, and the taxes for 1891, 1892 and 1893 were paid by the purchaser, and about the year 1901 the treasurer was enjoined from issuing a tax deed to the purchaser. *The taxes of 1894 to 1901 are not paid.* The land was sold for the taxes of 1902, at the sale of December 1, 1903, and the taxes for 1903 have been paid by the defendant. (Transcript, pp. 35 and 36.)

The plaintiff made regular application for a patent, as a purchaser from the railroad company, and the defendant made due and regular application to enter the entire quarter section, including the land in controversy, as a homestead. The Register and Receiver and the Commissioner held in favor of the defendant, but the Secretary reversed them and ordered a confirmatory patent to be issued to the plaintiff in error, and it was issued to him under date of May 27, 1901. This action was commenced May 1, 1901, and the cross-petition of the defendant was filed July 26, 1901.

The Assignment of Errors.

Counsel for plaintiff in error have assigned errors on nineteen grounds, and they have classified them under three heads. But the classification adopted is not accurate. A fair consideration of the alleged errors presents the following questions of law and fact for determination:

(1) The court erred in failing to hold that plaintiff in error was a good faith purchaser under the Adjustment Act of 1887. (Assignments 10, 12, 13, 14, 15, 19.)

(2) The court erred in holding that the plaintiff had abandoned his claim and was not entitled by reason thereof to resist the homestead application of the defendant in error. (Assignment 16.)

(3) The court erred in failing to hold that because of the prior actual possession of the plaintiff in error, whether such possession was under a valid claim or not, defendant in error could obtain or initiate any right or interest in the land in controversy under the homestead law. (Assignments 1, 2, 3, 4, 5, 17.)

(4) The court erred in failing to hold that the defendant in error was estopped because of the acts of Federal officers and courts from claiming that the plaintiff in error was not entitled to the land under the Act of March, 1887, or that the land reverted to the United States as "unearned" land, and became subject to homestead entry. (Assignments 8, 9, 11, 18, 19.)

Not one of these assignments of error is upon a purely legal ground; not one of them is possible of determination as a question of law, independent of some material question of fact, upon which a finding must first be made by the court trying the cause.

Brief of Points and Authorities.

(1) The trials and decisions of the District and the Supreme Court of Iowa did not involve the determination of a Federal question. Both courts based their judgments upon the determination of questions of fact and the application of the rules of the common law. Whether a party is estopped is not a Federal question. The writ of error should, therefore, be dismissed for want of jurisdiction.

Pittsburgh, etc., Iron Company v. Cleveland Iron Co., 178 U. S. 270.
Hamblin v. Western Land Company, 147 U. S. 531.
De Saussure v. Gaillard, 127 U. S. 216.
Johnson v. Risk, 137 U. S. 300.
Wood Mowing Machine Co. v. Skinner, 139 U. S. 293.
Bacon v. State of Texas, 163 U. S. 207.
Murdock v. Memphis, 20 Wall. 590.
Rutland R. Co. v Central Vermont R. Co., 159 U. S. 630.
Seneca Nation v. Christy, 162 U. S. 263.
Hammond v. Johnson, 142 U. S. 73.
Delaware City Co. vs. Reybold, 142 U. S., 636.
Waters-Pierce Oil Co. v. State of Texas, 212 U. S. 112.
Giles v. Teasley, 193 U. S. 146.

Leathe v. Thomas, 207 U. S. 93.
Elder v. Wood, 208 U. S. 226.
Fowler v. Lamson, 164 U. S. 252.
Arkansas, etc., R. Co. v. German Nat'l Bank, 207 U. S. 270.
Harrison v. Morton, 171 U. S. 38.
California Powder Work v. Davis, 151 U. S. 389.
Missouri Pac. R. Co. v. Fitzgerald, 160 U. S. 556.
Egan v. Hart, 165 U. S. 188.
Pierce v. Somerset R. Co., 171 U. S. 641.
Weyerhauser v. State of Minnesota, 171 U. S. 550.
Leondard v. Vicksburg, etc., R. Co., 198 U. S. 416.
Gillis v. Stinchfield, 159 U. S. 658.
Moran v. Horsky, 178 U. S. 205.
Rakes v. United States, 212 U. S. 58.
Seaboard, etc., R. Co. v. Duvall, 225 U. S. 477.

The findings of fact by the court below are conclusive in a proceeding in error.

Egan v. Hart, 165 U. S. 188.
Bement & Sons v. Nat'l Harrow Co., 186 U. S. 70.
Dower v. Richards, 151 U. S. 658.
Hedrick v. Athison, etc., R. Co., 167 U. S. 673.

"When it is unnecessary to decide a Federal question, and the state court has based its decision on a local or state question, our logical course is to dismiss the writ of error."

Eustis vs. Bolles, 150 U. S., 370.
Hale v. Lewis, 186 U. S. 473.
St. Louis, etc., R. Co. v. State of Missouri, 156 U. S. 478.
Castillo v. McConnico, 168 U. S. 674.
Remington Paper Co. v. Watson, 173 U. S. 443.

(2) The plaintiff in error was not a good faith purchaser under the Adjustment Act of March 3, 1887.

The Act of 1864 was not a present grant. Therefore the Sioux City Company, having failed to earn the land, acquired no right or title, legal or equitable thereto.

Sioux City & St. Paul R. Co. vs. United States, 159 U. S., 349.
Sioux City & St. Paul R. Co. v. County of Osceola, 43 Iowa 318.
Manley v. Tow, 119 Fed. 241.

The grant not being a present one, there was nothing to "adjust" so as to make it possible for one to be a good faith purchaser who purchased after the Act of March 3, 1887, took effect.

St. Louis, etc., R. Co. v. McGee, 115 U. S. 469.
Knepper v. Sands, 194, U. S. 476.
Manley v. Tow, 110 Fed. 241.
Sioux City & St. Paul R. Co. v. United States, U. S., 159, U. S., 349.
Logan v. Davis, 147 Iowa 441.
Ostrom v. Wood, 140 Fed. 294.
Olson v. Traver, 26 L. D. 350, 353.

(3) The defendant in error, having complied with the requirements of the homestead law, as far as he was permitted to comply, is entitled to the land as a homestead claimant.

26 Am. & Eng. Ency. Law (2d ed.) 397, 398.
Duluth, etc., R. Co. v. Roy, 173 U. S. 587.
Knepper v. Sands, 194 U. S. 476.
Moss v. Donovan, 176 U. S. 413.
Clements v. Warner, 24 How. 394.
Nelson v. Northern Pac. R. Co., 188 U. S., 108.
Ard v. Brandon, 156 U. S. 537.
Lake Superior, etc., Iron Co., v. Cunningham, 155 U. S. 354.
Manley v. Tow, 110 Fed. 241.
Benner v. Lane, 116 Fed. 407, 411.
Atherton v. Fowler, 96 U. S. 513.
Lyle v. Patterson, 228 U. S., 211.
Logan v. Davis, 147 Iowa 441, 453.

(4) The defendant in error is not estopped to make claim as a homestead entryman by reason of the acts of the Federal courts or officers in recognizing in the manner in which they did, certain rights of the Sioux City Company.

11 Am. & Eng. Encyc. Law (2d ed.) 434.
Clark v. Lyster, 155 Fed. 513.
Smith v. Hollenbeck, 231 Ill. 484.
Gjerstadengen v. Van Dusen (N. Dak.), 76 N. W. 233.
Walker v. Ehresman (Neb.), 113 N. W. 218.
21 Am. & Eng. Encyc. Law (2d ed.) 588.
Benner v. Lane, 116 Fed. 407.
Logan v. Davis, 147 Iowa 441, 451.

BRIEF AND ARGUMENT.

I.

(No Federal Question Involved.)

Both parties are in fact claiming title from the same source. Plaintiff in error claims the property under the provisions of the Adjustment Act of 1887. The defendant is error attempted to secure it under the homestead law, but failed. He now claims that the decision of the Land Department was in error in awarding the land to the plaintiff, and asks that he now be declared the trustee and ordered to convey it to the defendant in error.

It is apparent that throughout the litigation the real controversy was not relating to the right of one, under a proper state of facts, to the advantage of the Adjustment of Act of 1887, but rather relating to disputed questions of fact bearing upon the good faith of the plaintiff in error, and upon the point: whether the defendant in error was, under the facts relating to his entry and possession, entitled to take advantage of the homestead law. The whole controversy is based upon the determination of certain questions of fact, and the rights of the parties are wholly dependent thereon. The courts below determined these questions of fact

adversely to the plaintiff in error. On behalf of the defendant in error it is contended that no Federal question was determined by the Iowa Supreme Court in such manner as to entitle the plaintiff to a writ of error, and that the writ should be dismissed.

It will also be noted that the complaint on the part of the plaintiff in error is, not that he was deprived of some "title, right, privilege or immunity claimed under" a statute, but that the court erred in holding that the defendant in error was granted certain rights.

The fact that the plaintiff in his reply and counterclaim nowhere stands upon the legal effect of the Adjustment Act of 1887 to give him title to the land, shows that he did not feel warranted in relying upon a title derived under that statute, but instead upon the fact, as he claimed, that the defendant was estopped from claiming that the Act did not operate to give him the title. The attitude of counsel for the plaintiff in error is best shown by the following quotation from the opinion of the Iowa Supreme Court:

> "In view of the conclusion we reach on other matters presented *we deem it unnecessary to determine whether the land in controversy was subject to the Adjustment Act of March* 3, 1887. * * * The controlling question, as we view it, is whether the plaintiff was a purchaser in good faith within the meaning of the Adjustment Act of March 3, 1887. And, to determine whether he was or was not such a purchaser, it may be well to summarize the facts bearing thereon." (Transcript, p. 62.)

The Court further says:

> "*In his reply the appellant says that he does not rely upon any right under the Adjustment Act of* 1887, *except as he relies upon it through an estoppel.*" (Transcript, p. 64.)

Clearly no Federal question was involved or determined.

In Pittsburgh, etc., Iron Co. vs. Cleveland Iron Company, 178 U. S., 270, 44 L. ed., 1065, this court held that a decision by a state court holding that the rights of parties who make conflicting claims under United States patents are determined by a contract which they have made, and also that plaintiff's claim is defeated by estoppel, does not involve a Federal question for review by the Supreme Court of the United States on writ of error.

In Hamblin vs. Western Land Co., 147 U. S. 531, 37 L. ed. 267, it is held that where the government has conveyed public land by patent, in an action by the patentee to recover possession, the mere averment by the defendant of claim to the land by taking possession and making application to the land office under the United States homestead laws, does not create a Federal question; there must in addition be some reason to believe that the legal title was wrongfully conveyed by and still remains in the government.

> "It must appear affirmatively, not only that a Federal question was presented for decision to the highest court of the state having jurisdiction, but that its decision was necessary to the determination of the cause, and that it was actually decided, or that the judgment as rendered could not have been given without deciding it."
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> De Saussure v. Gaillard, 127 U. S. 216, 32 L. ed. 125, 132, see also
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> Johnson v. Risk, 137 U. S. 300, 34 L. ed. 683, 686.
>
> Wood Mowing Machine Co. v. Skinner, 139 U. S. 293; 35 L. ed. 193.

> "Where there are two grounds for the judgment of the state court, one only of which involves a Federal question, and the other is broad enough to maintain the judgment sought to be reversed, it is now settled that this court will not look into the Federal question, inasmuch as there is another ground upon which the judg-

ment can rest, and it will dismiss the writ for that reason."

Bacon v. State of Texas, 163 U. S. 207, 41 L. ed. 132, 139.

Murdock v. Memphis, 20 Wall. 590; 22 L. ed. 429.

Rutland R. Co. v. Central Terminal Ry. Co., 159 U. S. 630; 40 L. ed. 284.

Senica Nation v. Christy, 162 U. S. 263; 40 L. ed. 970.

Hammond v. Johnson, 142 U. S. 73; 35 L. ed. 941.

Delaware City Co. v. Reybold, 142 U. S. 636; 31 L. ed. 1141.

Waters-Pierce Oil Co. v. State of Texas, 212 U. S. 112; 53 L. ed. 431, 434.

Giles v. Teasley, 193 U. S. 146, 48 L. ed. 655.

"It is admitted that the general and well settled rule is that in a case coming from a state court this court can consider only Federal questions, and that it cannot entertain the case unless the decision was against the plaintiff in error upon those questions. Murdock v. Memphis, 20 Wall. 590, 22 L. ed. 429. * * * It is admitted further, that a decision upon those questions must have been necessary to the decision of the case, so that, if the judgment complained of is supported also upon other and independent grounds, the judgment must be affirmed or the writ of error dismissed as the case may be. Murdock v. Memphis, supra. But Murdock v. Memphis does not stop there. It further establishes that when the record discloses such other and completely adequate grounds this court does not commonly inquire whether the decision upon them was or was not correct, or reach a Federal question by determining that they ought not to have been held to warrant the result."

Leathe v. Thomas, 207 U. S. 93, 52 L. ed. 118, 120.

See also
Elder v. Wood, 208 U. S. 226; 52 L. ed. 464.

"It has been frequently decided that, to give the court jurisdiction on writ of error to a state court, it must appear affirmatively, not only that a Federal question was presented for decision by the state court, but that its decision was necessary for the determination of the cause, and that it was decided adversely to the party claiming a right under the Federal laws or constitution, or that the judgment as rendered could not have been so given without deciding it."
Fowler v. Lamson, 164 U. S. 252, 41 L. ed. 424.

"But, according to the well-settled doctrine of this court with regard to cases coming from state courts, unless a decision upon a Federal question was necessary to the judgment, or was in fact made ground of it, the writ of error must be dismissed. And even when an erroneous decision upon a Federal question is made a ground, if the judgment is also supported upon another which is adequate by itself, and which contains no Federal question, the same result must follow, as a general rule. Moreover, ordinarily this court will not inquire whether the decision upon the matter not subject to its revision was right or wrong. * * * Therefore, if we should be of opinion, as we are, that the Supreme Court rested its judgment upon principles of common law as it understood them, we should go no further, although the court also upheld and relied upon the statutes, whether, in our opinion, its views were right or wrong."
Arkansas etc. R. Co. vs. German Nat'l Bank, 207 U. S., 270; 52 L. ed., 201-203.
See Harrison vs. Morton, 171 U. S., 38; 43 L. ed., 63.

"It is axiomatic that in order to give this court jurisdiction on writ of error to the high-

est court of a state in which a decision could be had, it must appear affirmatively not only that a federal question is presented for decision by the highest court of the state having jurisdiction, but that its decision was necessary to the determination of the cause, and that it was actually decided, or that the judgment as rendered could not have been given without deciding it. And when the decision complained of rests on independent ground not involving a Federal question, and broad enough to maintain the judgment, the writ of error will be dismissed by this court without considering the Federal question that may also have been presented."

California Powder Works vs. Davis, 151 U. S., 389; 38 L. Ed., 206, 207.

Missouri Pac. R. vs. Fitzgerald, 160 U. S., 556; 40 L. ed., 536, 540.

"It is clear that if these questions of fact are adequate to determine the controversy between the parties, and broad enough to maintain the judgment independent of any federal question, that we are without jurisdiction, although the state court may have also decided such question."

Egan vs. Hart, 165 U. S., 188; 41 L. ed., 680.

"A person may by his acts or ommission to act, waive a right which he might otherwise have under the constitution of the United States as well as under a statute, and the question whether he has or has not lost such right by his failure to act or by his action is not a federal one."

Pierce vs. Somerset Ry. Co., 171 U. S., 641, 648; 43 L. ed., 316, 319.

"Whether a party in a case is given or refused the benefit of the law of estoppel involves no federal question."

Weyerhauser vs. State of Minnesota, 176 U. S., 550; 44 L. ed., 583, 587.

"It is thus seen that there where two questions determined by the state court: One related to the validity of the statutes passed subsequently to the execution of the mortgage, the court holding them valid, and that they did not impair the obligation of the contract contained in the mortgage. That is a federal question. The other related to the defense of estoppel on account of laches and acquiescence, which is not a Federal question. Either is sufficient upon which to base and sustain the judgment of the state court. In such case a writ of error to the state court cannot be sustained."

Pierce vs. Somerset Ry. Co., 171 U. S., 641, 648; 43 L. ed., 316-319, followed in:

Leonard vs. Vicksburg, etc., Ry. Co., 198 U. S., 416; 49 L. ed., 1108, 1111.

"Whether a party is estopped or not is not a Federal question. * * * The state court thus disposed of this branch of the case under general principles of law, and its decision did not rest on the disposition of a Federal question."

Speed vs. McCarthy, 181 U. S., 269; 45 L. ed., 855, 858.

"It is, however, contended that the record shows that a Federal question arose in the case, as considered by both the superior and the supreme courts, and was decided adversely to the plaintiffs in error. * * * But the decision of the supreme court was clearly based upon the estoppel deemed by the court to operate against plaintiffs in error upon general principles of law and the statute of California in respect of such a conveyance as that to Stinchfield, irrespective of any Federal question, and this was an independent ground broad enough to maintain the judgment."

Gillis vs. Stinchfield, 159 U. S., 658; 40 L. ed., 295, 296.

Moran vs. Horsky, 178 U. S., 205, 44 L. ed., 1038, was in error to the Supreme Court of the State of Montana to review a decision affirming a decree quieting title. Therein this court said:

> "The supreme court of the state affirmed the decree of the trial court primarily on the ground of laches. If this be an independent ground, involving no question under the Federal statutes, the decision of the supreme court must be sustained and the writ of error dismissed. * * * We, therefore, pass to an inquiry whether the question of laches is so intermingled with that of Federal right that the former cannot be considered an independent matter. * * * We conclude, therefore, that the defense of laches, which is in its nature a defense conceding the existence of an earlier legal right and affirming that the delay in enforcing it is sufficient to deny relief, is the assertion of an independent defense. It proceeds upon the concession that there was, under the laws of the United States, a prior right, and, conceding that, says that the delay in respect to its assertion prevents its present recognition. For these reasons we are of the opinion that the decision of the Supreme Court of Montana was based upon an independent non-Federal question, one broad enough to sustain its judgment, and the writ of error is dismissed."

If the trial court or the supreme court of the state had been compelled to construe the act of March 3, 1887, in order to render the decree they did, they would have had no other guide than the rules and principles of the common law and the decisions thereunder, and this court would have no jurisdiction to review the construction of the act in question by the state court.

See Rakes vs. United States, 212 U. S., 58; 53 L. ed., 402.

> "It must appear from the record that there was necessarily present a definite issue as to the act, so directly involved that the court could not have given the judgment it did without deciding the question against the contention of the plaintiff in error. * * * In such cases it is thoroughly well settled that the record of the state court must disclose that the right so set up and claimed was expressly denied, or that such was the necessary effect, in law, of the judgment."
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> Seaboard etc. R. Co. vs. Duvall, 225 U. S., 477; 56 L. ed., 1171.

It is evident that the courts below were called upon to determine this controversy by determining in the first instance at least controverted questions of fact. The court found that the plaintiff in error was not a good faith purchaser because of his knowledge of the character of the title to the land in controversy, and because of the constructive notice to him. The courts also found as a matter of fact that the defendant in error did not enter, occupy and cultivate the land under circumstances which would deny him the rights of a homestead claimant. These findings of fact are conclusive in this proceeding in error:

> "On error to a state court in a chancery cause, as in a cause at law, when the facts are found by the court below, this court is concluded by such findings."
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> Egan vs. Hart, 165 U. S., 188; 41 L. ed., 680.
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> Bement & Sons vs. Nat'l Harrow Co., 186 U. S., 70; 46 L. ed., 1058, 1065.
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> Dower vs. Richards, 151 U. S., 658; 38 L. ed., 305, 310.
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> Hedrick vs. Atchison etc. R. Co., 167 U. S., 673; 42 L. ed., 320.
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> "When we find it unnecessary to decide the Federal question, and when the state court has based its decision on a local or state question,

our logical course is to dismiss the writ of error."

Eustis vs. Bolles, 150 U. S., 370; 37 L. ed., 1111.
See also Hale vs. Lewis, 186 U. S., 473; 45 L. ed., 959.
St. Louis etc. R. Co. vs. State of Missouri, 156 U. S., 478; 39 L. ed., 502.
Castillo vs. McConnico, 168 U. S., 674; 42 L. ed., 622.
Remington Paper Co. vs. Watson, 173 U. S., 443; 43 L. ed., 762.

Under the foregoing authorities the wirt of error in this cause should be dismissed.

II.

Plaintiff in Error Not a Good Faith Purchaser.

If it should be held, notwithstanding the foregoing that a Federal question was involved, and determined by the courts below, then we contend that the plaintiff in error was not a good faith purchaser of the land in controversy within the provisions of the Adjustment Act of March 3, 1887.

A determination of this question depends upon the determination of (1) the legal effect of the grant of May 12, 1864; (2) the object and effect of the Adjustment Act of March 3, 1887, and (3) the knowledge and notice on the part of the plaintiff in error of the character of the title which the railroad company had at the time of his purchase.

(1) Section 1 of the Act of 1864 provides as follows:

> "That there be and is hereby granted to the State of Iowa for the purpose of aiding in the construction of a railroad from Sioux City in said state to the south line of the State of Minnesota, at such point as the State of Iowa may select. * * * And be it further enacted that that lands hereby granted shall be subject to

the disposal of the legislature of Iowa for purposes aforesaid and no other," etc.

It is evident that the grant could not have been one in praesenti for the following reasons:

(1) There was no corporation then organized—at least none was designated—to receive the grant; the Sioux Company was not then in existence, else it would have been named in the act, just as the McGregor Western Railway Company was named.

(2) The lands granted were subject to the disposal of the legislature of the state, and, while the manner of the disposition was prescribed by Section four of the act, yet it was a grant to the state in trust, to be administered in a particular manner, and any person taking the title, either from the state or from its grantee, would be charged with the nature of the trust.

The character of the grant affected by the Act of 1864 is clearly set forth in the case of Sioux City & St. Paul Railroad Company vs. United States, 159 U. S., 349, where it is said:

> "Another contention is that, upon the issuing of the patents of 1872 and 1873 to the state for the use and benefit of the railroad company, the title vested absolutely in the company, and the lands were thereby freed from restraints on alienation, from conditions subsequent, or from liability to forfeiture. In support of this contention, reference is made to Bybee vs. Railroad Company, 139 U. S., 663, 674, 676, 677; 11 Sup. Ct., 641; Van Wick vs. Knevals, 106 U. S., 360 (and other cases). But these are cases, as an examination of them will show, in which the grant was directly to the railroad company, or in which the Act of Congress required that the patents for lands earned should be issued, not to the state for the benefit of the railroad company, but directly to the company itself. In the case now before us the statute directed patents to be issued to the state

> for the benefit of the company. So that, until the state disposed of the lands, the title was in it as trustee, and not in the railroad company. Schulenberg vs. Harriman, 21 Wall., 59; Iron Co. vs. Cunningham, 155 U. S., 372, 15 Sup. Ct., 103."

In Sioux City & St. Paul Railroad vs. County of Osceola, 43 Iowa, 318, this same congressional act was under consideration. In that case the court says, with reference to the liability of the land for taxes (p. 321):

> "It will be observed that the lands, by this act, are granted to the State of Iowa, to be used and appropriated for the purpose prescribed. *The act does not name or indicate a person or corporation to whom the state shall convey the lands.* The state is to acquire the title to the lands in the manner prescribed. Upon completion of sections of the road, patents are to be issued to the State for specified quantities of the lands."

It follows that it was only when, and to the extent that, the Sioux City Company complied with all the requirements of the Act of 1864 and the acts of the legislature enacted for the purpose of carrying out its provisions, that it became entitled to any portion of the land grant, and the company having received its full quota of land for the five completed sections of the road and having failed to complete the road within the ten years from the date of the acceptance of the grant, that is, prior to September 18, 1876, it forfeited even the right to earn the 21,000 acres, including the land in controversy, the title to which was in the State as trustee, and the State having in turn failed to take advantage of the privilege of earning the land, by completing the road within five years, that is, prior to September 18, 1881, the title reverted to the United States, according to the plain wording of Section 4 of the Act. To remove all possible doubt as to the title to the lands in excess of what it had in fact earned, the legislature passed the Act of March 16, 1882, resuming all lands

not earned by the railroad company, and then passed the Act of 1884, providing:

> "That all lands and rights to lands resumed by Chapter 107 of the Acts of the 19th General Assembly of the State of Iowa are hereby relinquished and conveyed to the United States."

The effect of this failure on the part of the railroad company to complete the road is clearly stated in the case of Sioux City & St. Paul Railroad Company vs. United States, above quoted from. The Court says:

> "Giving effect to these rules of statutory interpretation we cannot suppose that Congress intended that the railroad company should have the benefit of more lands than it earned. As the lands granted could only be devoted to the construction of the Sioux City road from Sioux City to the Minnesota line, and as the state, holding the legal title in trust, has not disposed of and does not intend to dispose of them for the purposes of completing that part of the road between Sioux City and Le Mars, we perceive no sound reason why, within the meaning of the Act of 1864, these lands may not be regarded as 'undisposed of,' and equitably the property of the United States, if it be true that the railroad company has received as much of the public lands as it was entitled to have on account of constructed road certified to by the governor of the state. This was the interpretation placed by the state upon the Act of Congress; for by the act of the Iowa Legislature of March 16, 1882, the state, because of the failure of the Sioux City Company to construct any road between Sioux City and Le Mars, resumed the title to the lands that had not been 'earned' by the railroad company; and by the subsequent statute of March 27, 1884, it relinquished and conveyed to the United States all lands and rights of land re-

sumed and intended to be resumed by a previous act."

In Manley vs. Tow, 110 Fed., 241, 250, it is said:

> "It will be remembered that the State of Iowa never conveyed or transferred to the railway or to any one for its use or benefit the unearned lands in O'Brien and Dickinson Counties. These lands were patented to the state, it being recited in the patent that they were for the use and benefit of the Sioux City & St. Paul Railroad Company, but owing to the failure of the company to complete the line from Le Mars to Sioux City, the state refused to patent them to the company. It is strongly contended on the part of the defendant that the transfer to the state was a conveyance for the use and benefit of the company, but the true intent and meaning of this patent is to be derived from a consideration of the real purpose, and of the authority, with reference to the grant, conferred by the Act of Congress of 1864 upon the Land Department and the State of Iowa. *The act of Congress did not name the Sioux City and St. Paul Railroad Company as the grantee or beneficiary of the donation thereby made.* * * * *It would have been a violation of the terms of the grant if the state had conveyed these unearned lands to the company.* * * * *The company having failed to earn them, it acquired no title or right, legal or equitable, thereto, and it became the duty of the state to hold the lands for the benefit of the United States, to whom they reverted under the express provisions of the Act of* 1864."

With reference to the quantity of land to which the railroad company was entitled, the Court, in Sioux City & St. Paul Railroad Company vs. United States, says further:

> "Our conclusion, then, is that the Sioux City Company, having failed to complete the entire

road, for the construction of which Congress made the grant in question, was not entitled to the whole of the lands granted, but, at most, only 100 odd numbered sections, as these sections were surveyed, whatever their quantity for each section of ten consecutive miles constructed and certified to by the governor of the state; and that according to the measurement of 1887, which is accepted as the basis of calculation, the railroad company had, prior to the institution of this suit, received more lands, on acount of the 50 miles of constructed road certified by the governor, than it was entitled to receive. Under this view it is unnecessary to inquire whether the particular lands here in dispute should not have been assigned to the company, rather than other lands containing a like number of acres, that were in fact transferred to it, and which cannot now be recovered by the United States, by reason of their having been disposed of by the company. *If the company has received as much in quantity as should have been awarded to it, a court of equity will not recognize its claim to more, in whatever shape the claim is presented.* * * * The bill also states that the lands in Dickinson and O'Brien Counties here in dispute aggregate 21,979.85 acres, and so the decree below assumes. The amount appears to be 21,692.18 acres, and it was so stated by Secretary Lamar. 6 Land Dec., 63. But these differences are immaterial on the present appeal, for we adjudge that, *though the lands in dispute were patented to the state for the use and benefit of the Sioux City Company, the latter is not entitled to any part of them, whatever may be the aggregate quantity of acres.*"

The last clause of the Act of 1884 of the Iowa Legislature provided: "That nothing in this section shall be construed to apply to the lands situated in the counties of Dickinson and O'Brien," does not have the

effect of changing in the least the conclusion to be arrived at from the foregoing authorities, that the title to all the "unearned" lands, which included the lands in Dickinson and O'Brien Counties, were "relinquished and conveyed to the United States." Indeed the first section of that act itself so provides.

Neither should the action of the officers of the Land Department, in making the demand of the railroad company, nor the government in bringing the action against the company to quiet the title to the land, be considered as in any manner qualifying the title which passed by the Act of 1864. If, as held by the Supreme Court, title to the "unearned" lands was restored and reconveyed to the United States by the failure of the company to complete the road, and by the legislative acts of 1882 and 1884, then no action on the part of the Department could in any manner qualify the title conveyed by the state and vested in the United States, or be the basis of an equitable estoppel as against the United States.

(2) The Act of March 31, 1887, was a general one, applicable to all grants, but contemplated "adjustments" only where the grant vested a title in the railroad company, and not where, as in the Act of 1864, the title remained in the state, or where it had reverted to the United States, on account of the failure of the railroad company to earn the grant within the stipulated time.

The congressional railroad grants are of two classes. One class includes those grants which, upon the passage of the acts and the definite location of the line, vested in the railroad company a present equitable estate, the legal title passing upon certification or patent. The other class includes the grants, like that of May 12, 1864, to the state for the benefit of the railroad company already organized or one to be organized in the future, and providing for a conveyance or patent by the state to the company upon the completion of the road, or a specified portion of it. Under such grants, the railroad company, even if organized at the

time of the passage of the granting act, is seized of no present title or interest in the land patented by the United States to the state. Before it is entitled to the land it must 'earn" it, and before it is seized of any interest it must first receive a conveyance by legislative act or patent.

Upon the failure of the railroad company to perform the conditions of the granting act, in the first class, it is necessary that there shall be some declaration of forfeiture on the part of the United States, either through judicial proceedings, or by legislative action, sufficient to manifest an intention on the part of the United States to reassert title and resume the lands. In other words an "adjustment" is necessary.

St. Louis, etc. R. R. Co. vs. McGee, 115 U. S., 469.

In the second class of cases no forfeiture or "adjustment' is necesary. If by any rule of construction it should be found necessary generally, it was not necessary in this instance for the reason that in 1882 the state legislature pased an act resuming the unearned lands and in 1884 it passed another act conveying the unearned lands back to the United States. In the case of Knepper vs. Sands, 184 U. S., 476, a case involving lands included in this very grant, it is said:

> "For such road as the company had constructed, lands had been conveyed to it, and there never was a moment, according to the record, when the company could have rightfully demanded from the state a conveyance or patent for the lands here in dispute or for any other unearned lands. The legal title to the lands granted by the Act of Congress of 1864 was first in the United States, next in the state (Sioux City & St. Paul R. R. Co. vs. United States, 159 U. S., 349, 40 L. Ed., 177, 16 Sup. Ct., 17) but never in the company until a conveyance to it by the state. The state could only have conveyed lands to the company in consideration of constructed road; and subject to that condition

the company undertook to construct the road. When it abandoned the work of construction it lost the right to claim lands except for such road as it had previously constructed. The state, therefore, properly resumed, as by the Act of 1882 it did resume, after the company's default, such title to the unearned lands as it had before authorizing the company to construct the road. The state, after resuming the title, could have used the unearned lands to aid in the construction of that portion of the road which the railroad company failed to construct. But it did not do so, hence by the Act of April 2, 1884—eighteen years after it had accepted, in 1866, the grant of 1864, and the completion of the road having been abandoned—the state, by statute, formally relinquished to the United States, all its right, title and interest in the unearned lands pertaining to the Sioux City & St. Paul Railroad Company. *This statute, was perhaps unnecessary, as by the Act of* 1864, *the title to the unearned lands granted by that act was to revert to the United States after the expiration of fifteen years from the acceptance of the grant without the completion of the road. But the relinquishment by the state saved the necessity, if there was a necessity, of formal proceedings, legislative or judicial, by the United States to reinvest itself with full title. Thus the title to the unearned lands was put back into the United States.*"

In addition to the very evident fact that no adjustment was necessary, is the more significant fact that the plaintiff cannot be regarded as holding rights under Section 4 of the Act of 1887, or under any other section of the said act, as a purchaser in good faith, entitled to preference over a homestead claimant, because he purchased of the railroad company after the Act of March 3, 1887, went into effect. The plaintiff purchased September 11, 1888, eighteen months after the act took effect.

Section 4 of the act, the section under which the patent was issued, provides as follows:

> *"That as to all lands * * * which have been sold * * * by the grantee company, * * * the person or persons so purchasing in good faith * * * shall be entitled to the lands so purchased," etc.*

Could a statute be so worded to more clearly indicate that the sales of lands referred to were those which had been made by the railroad company prior to the passage of the act, and not sales made afterwards. If Congress had intended to include sales made by the company subsequent to the passage of the act it would have so indicated, and the words "*which have been sold*" would never have been used. A construction placed upon the section so as to include subsequent sales, as well as prior ones, would do violence to the meaning of the plainest English.

If it was the intention of Congress to permit the railroad company to make sales after the passage of the Act of 1887, and put such sales on an equal footing with those made before, then it was intended to make it possible for the railroad company to get the benefit of the "unearned" lands, contrary to the plainest terms of the grant—it intended the statute as an invitation to the railroad company to make haste and sell the 21,962 acres, either in bulk, or in parcels, for the best price obtainable, under any sort of a contract, and in this maner get the benefit of the market price of lands to which it had no more title or right than the tramp walking along the highway. The only difference, from the standpoint of the company, between the benfiets it would derive, under such a construction, between the "unearned" and the "earned" lands, would be that as to the former the company would be obliged to pay the government $400 for each quarter so sold. Such a construction would make no difference between the rights of a purchaser before the Act of March 3, 1887, and a purchaser after it. It cannot be possible

that Congress ever anticipated that such an intention on its part would ever be attributed to it, or that such a construction will ever be sustained by the courts of last resort. With reference to the very land in dispute in this case, it is further said in Knepper vs. Sands:

> "When the adjustment act of 1887 was passed the title of the United States to the unearned lands, including the particular lands here in dispute, was complete and perfect. * * * A chief purpose of the Act of 1887 was to declare forfeited unearned lands, and to restore them to the public domain; and not to give third parties and speculators an opportunity to purchase such lands from companies which had defaulted in the work of construction, and to whom the state had never conveyed, and thereby obtain a preference over actual settlers in possession."

Counsel are not unmindful of the fact that some federal jurisdictions have held that Section 4 of the Act of 1887 applied to sales made after the act took effect, as well as sales made before. But it must be noted that those decisions are not the latest pronouncements of the federal courts on the subject. The law may now be regarded as settled that Section 4 of the act, the section under which the patent to the land in controversy was issued, applies only to sales made before the passage of the act, and that one purchasing after the passage of the act is not one "purchasing in good faith."

> "In view of the settled rules that in the construction of grants of public domain in cases of doubt the interpretation most favorable to the government must be adopted, and as between rival claimants preference will be given to the actual settler, there seems to be no reason calling for an enlarged construction of Section 4 of the Act (1887) so as to extend its benefits to persons who have become purchasers of portions of

the unearned lands after the date of the adoption of the act."

Manley vs. Tow, 110 Fed., 241, 248.

"Giving effect to these rules of statutory construction, we cannot suppose that Congress intended that the railroad company should have the benefit of more lands than it earned."

Sioux City & St. Paul R. R. Co. vs. U. S., 159 U. S., 349; 40 L. ed., 177.

"*We are of the opinion that the fourth section of the adjustment act of* 1887 *has no reference to any unearned lands purchased after the date of that act from a company to whom they had never been certified or patented, although, if it had kept its engagement with the state and completed the road in due time, it could have acquired an interest in them.*"

Knepper vs. Sands, 94 U. S., 476; 48 L. ed., 1083.

"The natural construction of the words used in the fourth section, to-wit: 'That as to all lands * * * which have been sold by the grantee company,' would limit the application of the section to the lands that had been sold previous to the date of the act. If it had been that the section applies also to lands sold after the date the act took effect, then by construction, the rights of the grantees and purchasers holding under it are enlarged as against the rights of the grantor, to-wit: the United States. Furthermore, *if the prvoisions of Section* 4 *are held to apply to unearned lands sold after the adoption of the resumption act of* 1887, *then it will result in giving preference to speculating purchasers over actual settlers, who have spent time, labor and money in building up homes upon these lands, and will be a complete reversal of the rule heretofore followed by Congress, by the Land Department, and the courts in dealing with the*

disposition of the public domain, to-wit, to give preference to the actual settler."
Manley vs. Tow, 110 Fed., 241, 247. See also,
Benner vs. Lane, 116 Fed., 407, 410.

Counsel for the plaintiff may contend that if their client was not entitled to protection under the provisions of Section 4, the section under which his patent was issued, they might be entitled to the protection of the provisions of Section 5 of the Act of 1887. With reference to that section and its applicability it is said in the case of Manley vs. Tow (p. 251):

> "As I construe Section 5, it was intended thereby to give preference to claimants under the homestead and preemption laws, whose rights of occupancy were in existence at the date of the purchase from the railway company, as to all unearned lands the title to which had not been conveyed to the company, or, for its use, to some third party. To give the preference to the purchaser under the provisions of this section, it would appear that, at the date of the sale to him by the railway company, the title to the land purchased had been conveyed by the United States to the company or to some one for its use and benefit. A conveyance by the United States of land to a third party, as a trustee, to be held by the trustee in order to ascertain whether the railway company will earn its lands, it being the duty of the trustee to convey the lands to the United States if the conditions of the grant are not performed, is not a conveyance to the company, or for its use, within the meaning of the readjustment act."
> Manley vs. Tow, 110 Fed., 241, 251. See
> Benner vs. Lane, 116 Fed., 407, 410.

As has already been stated the Act of 1887 was a general one. Had the evil sought to be remedied by Congress been only that arising from the grant of May 12, 1864, the Act of 1887 would have had quite different

provisions. Section 4 was undoubtedly intended to cover mistakes, errors or irregularities which arose under railroad land grants which vested an interest in the railroad company. Under such grants there would be reason for recognizing the rights of the purchasers from the railroad company, after the Act of 1887 as well as before, and there would be reason for holding that such a purchaser was one in good faith, for he would be justified in acting upon the record evidence of the railroad company's vested title.

On the other hand there would be no reason for claiming that one is a purchaser in good faith, particularly after the Act of 1887, where the grant was of the character of that of May 12, 1864, for there was absolutely nothing of record to indicate that the Sioux City Company had any vested rights, or even a claim of ownership.

It is because of the failure to recognize the distinction between grants vesting title in the railroad company and grants which do not, that counsel have insisted that the case of Southern Pacific Railroad Company vs. U. S., 184 U. S., 54; L. ed., 425, is in point. With reference to that case it is said in Benner vs. Lane, 116 Fed., 407, 410:

> "Since the rendition of the opinion in Manley vs. Tow, the Supreme ourt in the case of U. S. vs. Southern Pacific R. R. Co., has given a construction to the acts of February 12, 1887, and March 2, 1896, and holds that Section 4 of the Act of 1887 is not to be restricted to purchases made before the adoption of that act, but will include transactions had before the final adjustment of the particular grant under the general provisions of the act. *In the opinion filed in the case cited it is expressly stated that the question decided was one wholly between the government and the purchaser from the railway company, as no third party was claiming title thereto.*"

The lands involved in the Southern Pacific case were

lands covered by a grant under which the title passed to the railroad company. The facts are therefore distinguishable from the facts in the case at bar.

This distinction must also be kept in mind in considering the Act of 1896.

> "The Act of 1896 refers only to lands patented or certified, and the parties who contracted with the company for unpatented lands must rely for protection upon the Act of 1887."
>
> Southern Pacific Railroad Company vs. U. S., 184 U. S., 54; 46 L. ed., 425, 429.

It follows from the foregoing that, by reason of the fact that plaintiff's assignor purchased from the railroad company after the Act of March 3, 1887, took effect, neither she nor the plaintiff is entitled to the protection of its provisions.

(3) The plaintiff in error, charged with constructive, if not actual, notice of these facts, is not, therefore, a purchaser in good faith under the terms of the Adjustment Act, or independent of it, and is not entitled to protection as such a purchaser.

This must necessarily be true from the authorities cited in the preceding divisions of this brief. If the railroad company acquired no interest under the grant, and if the Act of 1887 was for the relief of purchasers only, of unpatented lands before the act took effect, it must necessarily follow that plaintiff in error who purchased, or rather took an assignment of a contract from one who did purchase, after the act took effect, is not a good faith purchaser and is not entitled to protection under the provisions of the act. He was a business man in Sheldon. He knew that there was litigation regarding the "O'Brien County Lands." He doubtless was perfectly familiar with all the facts relating to the matter, and had actual knowledge of the character of the railroad company's title. If he did not have actual knowledge he had constructive knowledge of the public records constituting the railroad company's title, or rather want of title. His assignor

contracted with the railroad company a year and a half after the Act of 1887 took effect; four years after the date of the reconveyance by the state to the United States—nearly twelve years after the title had reverted to the United States because of the failure of the company to complete the road, and over a year after the action of the secretary in adjusting or determining the claims of the United States. All of these facts were known to the plaintiff in error as a matter of law. Legally he knew, and his assignor knew, that the railroad company, the party from whom the purchase was made, had absolutely no title. It was a purely speculative venture on their part, especially in view of the modification made in the contract of purchase. If they can be regarded as purchasers in good faith entitled to protection it would be difficult to tell who would be a purchaser in bad faith. This point has been passed upon in recent case.

"For these reasons I have adhered to the view expressed in Manley vs. Tow, supra, that:

> 'To give preference to the purchaser under the provisions of Section 5, it must appear that at the date of the sale to him by the railway company the title to the land purchased had been conveyed by the United States to the company, or to some one for its use and benefit. *A conveyance by the United States of land to a party as trustee, to be held by the trustee, in order to ascertain whether the railway company will earn the lands, it being the duty of the trustee to reconvey the lands to the United States, if the conditions of the grant are not performed, is not a conveyance to the company or for its use within the meaning of Section 5 of the readjustment act.*'
>
> "If this is the corect interpretation of Section 5, it follows that under the provisions of that section the homestead claim of Benner is to be given the preference over the claim of the pur-

chaser, thus entitling the complainant to the relief sought by the bill herein filed.

"Should this construction of the provisions of Sections 4 and 5 of the Act of 1887 not be sustainable, yet the rights conferred by these sections, and also the Act of 1896, are only available to bona fide purchasers, and therefore to secure preference in the disposition of the lands, the purchaser must show that, as between himself and the homestead claimant, he is a bona fide purchaser."

Benner vs. Lane, 116 Fed., 407, 410.

See Ostrom vs. Wood, 140 Fed., 294.

"*As the state, by legislative enactment, had afterwards relinquished its interest to the United States—all before the passage of the adjustment act—the appellant could not, within the meaning of the act, and after its passage have become a purchaser in good faith of the lands here in dispute. The sale by the railroad company to the appellant was a sale of something it did not possess, a mere device to bring its purchasers within the provisions of the adjustment act of* 1887, *when that act was never intended to apply to such a case.*"

Sands vs. Knepper, 194 U. S., 476.

Shall this court aid the railroad company in making effectual its "device" to bring the plaintiff as one of its purchasers within the adjustment act of 1887, "when the act was never intended to apply" for the protection of such purchasers?

(4) *The plaintiff in error is not a bona fide purchaser for the reason that he voluntarily abandoned his rights as purchaser.*

It will be noted that while the action on the part of the United States was pending in the courts the railroad company, apparently becoming alarmed lest it might be compelled to pay heavy damages to its pur-

chasers, in the event it should be held that the title to the land was in the United States, secured from its purchasers a modification of the contract as follows: (Transcript, pp. 7, 8.)

> "That in the event of a decision in the above entitled action in the United States Supreme Court adverse to the said Sioux City & St. Paul Railroad Company as to the title to the said lands above described, the said parties of the second part will within 90 days thereafter surrender said original agreement and this modification thereof to the parties of the first part at St. Paul, Minnesota, and receive therefor from the parties of the second part, or either of them, the amount received and accepted by said second parties in full settlement of all their rights under said original agreement and this modification thereof, and as a release of any and all claims suffered by said parties of the second part, their heirs, executors, administrators or assigns, by reason of the failure of the title of said parties of the first part of the said land." (The foregoing is the full modification agreement. Only a digest of it appears in the transcript.)

After this modification was entered into the plaintiff was no longer a purchaser in any proper sense. Liberally construed, it might be said to be an option but nothing more. Strictly speaking, the railroad company had sold nothing and the plaintiff had bought nothing. As it developed the plaintiff had only a contract fixing the amount he might recover from the railroad company. The company knew at the time the pretended sale was made that it was a mere speculation; it knew that it had nothing to sell, and it knew that it had sold nothing at the time that the modification was entered into. With reference to this modification it is said in Olson vs. Traver, 26 L. D., 350, 353:

> "Conceding for the sake of argument that the original contract evidenced a purchase from the

company, and that it is otherwise shown that Olson acted in good faith and was duly qualified as required, the supplementary contract clearly provided for annulling and surrender of the original contract, and an abandonment of Olson's rights thereunder on the happening of a stated contingency and for the payment to him of a liquidated sum for said surrender and abandonment. After the Supreme Court, on October 21, 1895, decided that the company had no title to the land, under the terms of the supplementary contract and within the time fixed therein, in contemplation of law, the abrogation and annullment of the first contract and the abandonment of Olson's rights thereunder became fixed, determined and complete. In lieu thereof he had only the supplementary agreement which does not evidence a purchase by him from the company but an annullment of the claim of purchase."

Counsel for the defendant are aware that Circuit Judge Shiras has held to the contrary, but a fair consideration of the contract in the light of the surrounding circumstances lead us to the conviction that the view of the secretary is the more reasonable and logical.

The controversy therefore resolves itself to the determination of the right of a homestead claimant as against the claim of one who, if not a mere speculator, occupies the position of one; one who is not a good faith purchased entitled to the protection of the Act of 1887; one who was not a purchaser in any sense. He simply had a contract under which he was entitled to demand from the railroad company the small amount of the purchase money he had paid to it.

In addition to this evidence of abandonment is the further fact that the plaintiff in error never entered upon the land in any manner; never demanded possession of it, and never paid a dollar of taxes on it, or offered to pay the taxes so far as the evidence shows.

The defendant was in the meantime improving the property, believing as he was justified in believing that the plaintiff had abandoned his claim to the property till the action was commenced eleven years after the defendant had taken complete possession, and fourteen yars after he had taken actual possession of part and constructive possession of the whole. If Mrs. Childs or the plaintiff had believed that they were entitled to the possession, or if they had prior possession they would never have permitted the defendant to remain in possession unmolested.

III.

Right of Defendant in Error to Make Homestead Entry.

The defendant in error, having complied with the requirements of the homestead law, as far as he was permitted to comply, is entitled to the land as a homestead claimant.

The defendant made settlement upon the land and tendered his filing and his fees in conformity with the requirements of the law. He continued to occupy the premises without interference till this action was commenced and then set up his rights by cross-petition. What more could he have done to preserve his rights? Having complied with the law he is entitled to the protection of the courts.

> "If for any reason recognized in courts of equity as a ground for interference in such cases, the legal title has passed from the government to one person when in equity and good conscience and by the laws which Congress has made on the subject it ought to go to another, a court of equity will consider him as a trustee for the true owner and compel him to convey the legal title. * * * So it has been held that the aggrieved party may in a proper case proceed against the patentee by a bill to quiet title and to remove what would otherwise be a cloud upon his own title."

26 Am. & Eng. Cyc. Law, (2d ed.), p. 397, 398, and cases.

In Duluth & I. R. R. R. Co. vs. Roy, 173 U. S., 587; 43 L. ed., 820, the facts were similar in many respects to the facts in the instant case. That was an action by the defendant in error against the railroad company and others to quiet the title to a quarter section of land in the State of Minnesota, brought in the District Court of that state, resulting in a decree for the plaintiff. That decree was affirmed by the Supreme Court of the state and a writ of error taken to the Supreme Court of the United States. The defendant in error, being at the time duly qualified, settled on the land in May, 1883, and thereafter continued to occupy the place as a home. In July he went to the land office to file and was informed that protests had been filed against the survey. In August, 1884, he discovered that the state was claiming the land under the swamp land act. He then made application to enter the land under the land laws and tendered the fees to the local officers, and the application was rejected. He filed a contest and it was rejected and he appealed. In January, 1885, while the appeal was pending, the lands, through mistake and inadvertence, were patented to the state. The defendants took conveyance of the lands with notice of the right, claim and interest of the plaintiff (defendant in error). The Court says:

> "Do the facts entitle the defendant in error to the relief awarded to him by the state courts?
>
> "It is now too well established to need argument to support, or a citation of authorities, that when a patent is obtained from the United States by fraud, mistake or imposition, the question thence arising becomes one of private right, and the courts in a proper proceeding and in the execution of justice will divest or control the title thereby acquired, either by compelling a conveyance to the plaintiff or by quieting his title as against the defendants and enjoining

them from asserting theirs. And in two late cases (Germania Iron Co. vs. U. S., 153 U. S., 379; 17 Sup. Ct., 377. Williams vs. U. S., 138 U. S., 514; 11 Sup. Ct., 457) it was decided that this power extends to cases in which the patent was issued by inadvertence and mistake—the grounds relied on in the case at bar.

"The plaintiff in error, however, contends that the defendant in error cannot invoke this doctrine, because he is not in privity with the United States; that he has not proved or offered to prove to it, or established, or alleged, even, in this case, the ultimate facts upon which alone his claim could be recognized, or its validity established. In other words, that he has not made, or has offered to make, final proof.

"This contention is attempted to be supported by the principles announced in Bohall vs. Dilla, 114 U. S., 47; 5 Sup. Ct., 782. Sparks vs. Pierce, 115 U. S., 408; 6 Sup. Ct., 102. Lee vs. Johnson, 116 U. S., 48; 6 Sup. Ct., 249. The principles are that to enable one to attack a patent from the government, he must show that he himself was entitled to it. It is not sufficient for him to show that there may have been error in adjusting the title to the patentee. He must show that by the law properly administered the title should have been awarded to him.

"We do not question these principles, but they only mean that *the claimant against the patent must so far bring himself within the laws as to entitle him, if not obstructed or prevented, to complete his claim.* It does not mean that the moment of time that the patent issued it should have been awarded to him. The acts performed by him may or may not have reached that completeness; may not have reached it and yet justify relief, as in Ard vs. Brandon, 156 U. S., 537; 15 Sup. Ct., 406 and in Morrison vs. Stalnaker, 104 U. S., 212. And because of the well-

established principle that where an individual in the prosecution of a right has done that which the law requires him to do, and he has failed to attain his right by the misconduct or negligence of a public officer, the law will protect him Lytle vs. Arkansas, 9 How., 333.

"It would be arbitrary to apply the principle to some acts and not to others; might destroy it utterly to require the perfomance of all. But we are indisposed to extend the argument, because we regard Ard vs. Brandon as decisive

"In that case the claimant against the patentee, being qualified and entitled, offered to make final proof, and from the denial of the offer prosecuted appeals successively to the Commisisoner of the General Land Office and to the Secretary of the Interior and each decided against him. In this case the defendant in error, also being qualified and entitled, offered to enter the land, which offer was denied, and against the claim of the State of Minnesota, he instituted the contest which was pending in the General Land Office when the patent was issued by inadvertence and mistake, and his right thereby defeated. We do not regard the difference in the cases substantial.

"But it is urged that defendant in error may not be able to make final proof and that the Land Department, whose jurisdiction is exclusive, may determine the lands not to be swamp or overflowed. Neither supposition can be indulged. The findings of the court show full qualification in the defendant in error, and we cannot presume that the Land Department will find against the fact, which the state courts have found, that the lands were not at the time of the pasage of the Act of March 12, 1860, nor were they, nor are they now, swamp or overflowed or unfit for cultivation."

What more, or otherwise, could the defendant have

done to secure for himself the favorable consideration of a court of equity. Were the plaintiff a purchaser in good faith and not a speculator, the view might be different.

> "The policy of the government has always been favorable to actual settlers."
>
> Knepper vs. Sands, 194 U. S., 476; 48 L. ed., 1083.
>
> "The obvious purpose of the pre-emption and homestead laws of the United States is to secure to the actual settler the land upon which he has settled, and to give him the prior right to perfect title by purchase or continued occupation. While, undoubtedly, under the provisions of the statutes and the regulations of the Land Department, there are opportunities for a speculator to obtain title to public lands, *it must be always remembered that in the eye of the public land laws of the United States the speculator is never the object of favor.* Pre-emption and homestead laws were enacted for the benefit of the actual settler, and to that end they should be construed and administered."
>
> Moss vs. Donovan, 176 U. S., 413; 44 L. ed., 526.
>
> "The policy of the Federal government in favor of settlers upon public lands has been liberal. *It recognies their superior equity to become the purchasers of a limited extent of land, comprehending their improvements, over that of any other person.*"
>
> Clements vs. Warner, 24 How., 394; 16 L. ed., 695, 696.
>
> "If it be said that Nelson's claim was that of mere occupancy unattended by formal entry or application for the land, the answer is that it was a condition of things for which he was not in any wise responsible, and his rights, in law, were not lessened by reason of that fact. The land was not surveyed until twelve years after

he took up his residence on it, and under the homestead law he could not initiate his right by formal entry of record until such survey. He acted with as much promptness as was possible under the circumstances."

Nelson vs. Northern Pac. R. R. Co., 188 U. S., 108.

"The law deals tenderly with one who, in good faith, goes upon the public lands with a view of making a home thereon. *If he does all that the statute prescribes as the condition of acquiring rights, and does not make their continued existence depend upon the question whether or no he takes an appeal from an adverse decision of the officers charged with the duty of acting upon the application.*"

Ard vs. Brandon, 156 U. S., 537; 39 L. ed., 524, 526.

Objection is urged against the good faith of the occupancy of the homestead claimant on the ground that his occupancy of the land began after the land was withdrawn from entry by operation of the grant contained in the Act of 1864, and the action of the Land Department based thereon. This question is put at rest by the ruling of the Supreme Court in Lake Superior, Etc., Iron Company vs. Cunningham, 155 U. S., 354; 39 L. ed., 183, where it is said:

"But it is said by the counsel for the company that it was not a bona fide homestead claim, because at the time the defendant entered upon the land he understood that it was a part of a railroad grant. * * * If he did, he knew that the railroad grant had been outstanding thirty-two years, that the land was to be restored to the government if the road was not completed within ten years and that twenty-two years had passed since the time fixed by Congress for the completion of the road and nothing had been done. His expectation was (and under the cir-

cumstances, not an unreasonable one) that Congress would at some near time interfere to remove the outstanding claim. Under these circumstances and in expectation of such removal, he enters upon the land. Can it be said that this entry and occupation was with the view of depriving anybody of title or that it was, as against the company, a wrongful entry? If the construction contended for were accepted, it would exclude from the benefit of the act any settler upon these lands who knew that the land he entered upon was within the railroad grant. But legislation respecting the public lands is to be construed favorably to the actual settler, and the construction contended for by the canal company seems to us too narrow. If a party entering a tract, although he knew that it was within the limits of an old railroad grant, if not technically extinguished by the lapse of time, had remained so long unappropriated by the beneficiary that Congress would shortly resume it, and in that belief determined to make for himself a home thereon, with the view of perfecting his title under the land laws of the United States when the forfeiture should be finally declared, it must be held, we think, that he is, within the terms of this confirmatory act, a bona fide claimant of the homestead."

See also Manley vs. Tow, 110 Fed., 241.

Benner vs. Lane, 116 Fed., 407, 411.

Counsel for the plaintiff in error attempts to give the impression that the defendant did not make legal settlement on or claim the land in controversy, but only claimed the adjacent south half of the quarter. There is no foundation for such a contention. The defendant had purchased the claim and improvements of one Weir in April, 1888. In the nature of things he could not have all his improvements on both eighties, and with his limited means he was unable to cultivate at

the start more than part of the eighty where his improvements were located. About fifteen acres of the land in controversy were cropped by one Fitzgerald, who made no claim to the land beyond the right to crop the part he had broken up. The eighty in controversy was not fenced, excepting the part of it which the defendant pastured. He had attempted to put in a crop on the breaking in 1888, but the crop was appropriated by Fitzgerald. In 1890 the defendant broke up practically all of the land which had not previously been broken and has farmed the whole quarter section ever since, without molestation by Fitzgerald, Mrs. Childs, the plaintiff or any person, and without even having demand made upon him for the land. If Mrs. Childs or plaintiff had been entitled to possession by reason of prior possessory rights, they could and doubtless would have obtained possession by suit if not otherwise. Certainly the predatory manner in which Fitzgerald cropped the fifteen acres should have but little weight as against the homestead claim of one who used and claimed the land in good faith as a part of the quarter section, which he subsequently applied for as a homestead. It is such a universal custom for an entryman to take a quarter section, that it might be considered that the possession of an eighty of a quarter would be constructive notice that the party occupying that eighty was also claiming the remaining one. The "device" of the railroad company in leasing the land to Fitzgerald, without the knowledge of the defendant, and by Mrs. Childs to him in 1889, should be given no consideration in view of the fact that absolutely nothing was done thereafter by either the Company, Mrs. Childs or the plaintiff in error, to assert their claim to the land. Under the circumstances it might be reasonably inferred that they made no claim.

In support of their contention that the defendant in error, under the circumstances, could not initiate a homestead right, counsel for defendant in error cite Atherton vs. Folwer, 96 U. S., 513, and Lyle vs. Patterson, 228 U. S., 211. The facts in these cases are

very different from what they are in the case at bar. In the Atherton case it was held that no pre-emption right could be initiated where the claimant has obtained possession by breaking into the inclosure of one who has already settled upon, improved and inclosed the same, and that such intrusion, although made under the pretense of pre-empting the land, is but a naked unlawful trespass. Similarly in the Lyle case the pivotal question was whether the homestead claimant entered upon the actual, open, exclusive possession of the contract purchaser. In this case it almost conclusively appears that the contract purchaser was in the actual, open possession of the land at the time the complainants attempted to enter, preparatory to filing on the land, and that such entry was not made till 1895, and after it was determined by the United States Supreme Court that the land was a part of the public domain. The Court was, therefore, warranted in finding that the complainant was a mere trespasser and acquired no rights under the homestead laws.

Quite different is the situation of the parties in the case at bar. Neither the plaintiff in error nor his assignor, ever had possession of more than a few acres of the tract in controversy, and that possession was only of a transitory nature. From the time that the defendant took possesion of the whole of the tract in 1890, down to the date of the trial, the plaintiff in error "made no move to regain possession, and, so far as the record shows, made no claim thereto until this action was commenced." He never paid any taxes on the land or offered to pay any. He even went so far as to surrender his rights as a purchaser by accepting the modified contract of March 13, 1894, by which he agreed to accept a stipulated sum in the event the decision of the United States Supreme Court was against the railroad company.

The Iowa Supreme Court summarizes the facts which it is claimed by the plaintiff in error show that the defendant had no vaild homestead claim as follows (Transcript, p. 64, 147 Iowa, 441, 453):

"It is said that the defendant obtained possession of the land by trespass, and, because thereof, he can base no homestead rights thereon. If it be conceded that the defendant's original possession of the particular land in controversy in 1890 was obtained by trespass, it does not follow that he could thereafter obtain no homestead rights. At the time of the trespass he simply invaded the wrongful possession of another. The land was not then subject to entry for any purpose. The plaintiff apparently acquiesced in defendant's possession. He at least made no protest, or claim, against the defendant until after he received a patent, and, when the land became subject to public entry, the defendant had been in peaceable and uninterrupted possession for several years. *Under such circumstances we do not think the rule contended for by the appellant is applicable. That the defendant made his claim in good faith is established by the holding in Ship Canal, etc. Co. vs. Cunningham*, 155 *U. S.*, 354; 39 *L. ed.*, 183."

It is claimed that the entry by the defendant in error was tortious because, under the law in force at the time of the entry, one was entitled to only 80 acres of land of the character claimed to have been entered. The fact is, that the complainant was not entitled to enter any amount of land because it had been withdrawn from public entry and was not restored to entry till 1895. The defendant knew this, or was at least charged with the knowledge. He also knew that the land was "unearned" railroad land which would ultimately be opened to entry, but he could not know when the land department would take action to that end.

Moreover the defendant does not claim to have entered 160 acres for the purpose of homesteading that quantity. He did not have to make known his claim, and the extent of it, till the land was declared subject

to entry. At the time he went upon the land he had the right to enter for pre-emption and for timber culture, a quantity of land in addition to what was entered for the purpose of taking a homestead, and this was often done by the settler. In the absence of a showing to the contrary the defendant will be presumed to have entered in compliance with the existing law, and that his entry was lawful.

IV.

Equitable Estoppel Not Available to Plaintiff in Error

The defendant in error is not estopped to make claim as a homestead entryman by reason of the acts of the Federal courts and officers in recognizing, in the manner in which they did, certain rights of the railroad company.

It is a fundamental principle of equity jurisprudence that only those are entitled to the protection of the doctrine of equitable estoppel who have acted in good faith. He who comes into a court of equity must come in with clean hands. Can it be said that one has acted in good faith, entitled to the protection of a court of equity under the doctrine of equitable estoppel, who, with knowledge—for the plaintiff in fact had knowledge—that the railroad company, as stated by Justice Harlan in Knepper vs. Sands, was making a "sale of something it did not possess a mere device to bring its purchasers within the provisions of the adjustment act of 1887, when that act was never intended to apply to such a case?"

The doctrine of equitable estoppel is entirely aside from the law applicable to the case at bar, in any event so far as the plaintiff is concerned:

> "It may be stated as a general rule that it is essential to the principle of equitable estoppel that the party claiming to have been influenced by the conduct or declarations of another to his injury, was himself not only destitute of knowledge of the state of facts but was also

destitute of any convenient and available means of acquiring such knowledge, and that where the facts are known to both parties, *and that both have the same means of ascertaining the truth, there can be no estoppel.*"

11 Am. & Eng. Encyc. Law (2d ed.), 434.

Clark vs. Lyster, 115 Fed., 513.

Smith vs. Hollenbeck, 231 Ill., 484.

Counsel for appellant contends that the action taken by the officers of the land department in allowing the plaintiff to make application for the land as a contract purchaser, and the subsequent issuance of a patent to him estops the United States, and hence the defendant, from calling the validity of the patent in question, even though those officers acted without authority. But such is not the law.

Where a probate court ordered the sale of land of a third person to pay the debts of a decedent, such order is held void for want of jurisdiction over the property, and the purchaser cannot invoke the doctrine of equitable estoppel.

Gjerstadengen vs. Van Duzen (N. Dak.), 76 N. W. 233.

In that case the court says:

"The case merely presents a mutual mistake as to the law, the facts being known to all the parties. If it be said that the purchaser is protected because he did not know the law, then it may be said that Peterson has done nothing to estop himself, for he has an equal right to plead ignorance of the law. And if, on the other hand, it be urged that Peterson is charged with knowledge of the law, and is therefore estopped from ascertaining his title, it may with equal force be answered that the purchaser is likewise chargeable with knowledge of the law, and is therefore estopped from asserting his title under his purchase, and hence cannot

invoke against Peterson the doctrine of estoppel; for he who has not been misled cannot demand that the lips of another shall be sealed against the assertion of a right."

In Walker vs. Ehresman (Neb.), 113 N. W., 218, it is said (p. 220):

> "Defendants' next insistence is that plaintiffs, having 'stood by and watched the probate proceedings, and having had full knowledge of the transfers, and made no objection to the probate of the will,' are estopped from now asserting rights or title to the land in question. It does not appear that the plaintiffs were apprised of the true state of their title, or that their conduct was intended to deceive, or that defendants were destitute of all convenient or ready means of acquiring knowledge of the true state of the title, or that they relied upon the conduct of the plaintiffs to their detriment. Under the circumstances disclosed, it cannot be said that the plaintiffs were estopped from asserting title to the real estate which was not subject to devise and which did not belong to the estate at the time of the conduct complained of. The facts all appeared of record, and defendants' mistake was a mistake of law. We are of the opinion that the facts relied on lack the essential elements of estoppel."

In this case the land had been entered as a timber culture claim by one who subsequently died, and it was held that as the land did not belong to the estate of the deceased, and was not devisable by him, the county court had no jurisdiction to determine the title to the real estate by adjudging that the devisees named in the deceased entryman's will were the owners of the premiss to the exclusion to the heirs at law in whose name the patent was issued by the United States.

> "It is a general rule of law, founded upon

public policy, that all persons must take notice of the public laws by which they are governed. Consequently all persons interested in transactions made pursuant to a public statute are chargeable with notice of all that the law contains."

21 Am. & Eng. Cyc. Law (2d ed.), 588.

"Clearly, therefore, Benner has an equity to which due consideration must be given, and which, under the settled policy of the government, entitles him to have the land awarded him as a homestead, unless the defendant, Lane, can show either a legal title to the land or a superior equity growing out of his connection with the premises. Lane is a purchaser under the railroad company. The company, however, never acquired the title to the land, and therefore Lane has no better legal title than his vendor. If the contract of sale had not been made, it is certainly true that the company, under the facts, could not possibly assert that it had either record title or the right to the legal title of this land, and, therefore, if the company had interposed at the hearing in the land office and had endeavored to defeat the right of Benner as a homestead occupant, on the ground of a superior title or a superior equity, such claim on its part would have wholly failed."

Benner vs. Lane, 116 Fed., 407.

The Iowa Supreme Court thus correctly summarizes the facts bearing upon the good faith of the plaintiff in error, and his right to invoke the doctrine of equitable estoppel (Transcript, p. 63, 147 Iowa, 441, 451):

"While the railroad company earned the land in controversy by the completion of its third section of the road, when it accepted other land in place thereof and then failed to complete the road for which the grant was made, it had no right to the land in controversy, nor any

equity therein, and it became a part of the unearned lands which reverted to the United States upon the failure of both the railroad company and the state to complete the road. Sioux City & St. Paul Ry. Co. vs. U. S., 159 U. S., 349, 40 L. ed., 177. The railroad company had no title to the land in controversy when it leased it to Fitzgerald, nor when it contracted to sell it to Ellen M. Childs in September, 1888. The company undoubtedly knew that it had not right to the land in controversy, and hence its acts were clearly not in good faith. When the plaintiff took an assignment of the Childs contract, he knew of the suit that had been brought by the United States to quiet its title to the unearned and unpatented lands, and that the land in controversy was included therein. He is presumed to have known the terms of the grant and the character of the railroad company's title, and he at least legally knew that it had absolutely no title. His agreement of October 8, 1889, with the railroad company furnishes abundant evidence of his complete knowledge of the whole situation. In addition thereto, he knew, in a general way at least, the history of the litigation over these lands, and that the title thereto was unsettled. After the defendant had taken possession of the land in 1890, the plaintiff made no move to regain possession, and, so far as the record shows, made no claim thereto until this action was commenced. From all these facts and circumstances we think it must be said that the plaintiff was not a purchaser in good faith. Good faith means without notice, as well as for a valuable consideration. * * * In Knepper vs. Sands, supra, it was held that as the fourth section of the adjustment act of 1887 had no reference to unearned lands purchased after the date of that act, a purchaser thereafter could not become one

in good faith within the meaning of the act. In his reply the appellant says that he does not rely upon any rights under the adjustment act of 1887, except as he relies upon it through an estoppel. But the estoppel relied upon is based upon the claim that he was a good faith purchaser under the act, and when it is once determined that he did not so purchase, there can be no estoppel. To invoke the doctrine of equitable estoppel, the party claiming thereunder must show that he was himself unaware of the facts and had no convenient and available means of acquiring the knowledge. Where the facts are known to both parties, or where they both have the same means of ascertaining the truth, there can be no estoppel."

Therefore, even if it should be held that a Federal question was presented for determination in the court below, and that the case could not have been decided adversely to the plaintiff in error without deciding the question, then, we contend, under the facts and the law, the cause was rightly determined, and on the merits the writ of error should be dismissed.

Respectfully submitted,

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Solicitors for Defendant in Error.

chases made after the date of the act, no less than prior purchases, if made in good faith, and many thousands of acres having been patented to individuals under that interpretation, this court will not now disturb it. *Knepper* v. *Sands*, 194 U. S. 476, distinguished.

A remedial statute is to be construed liberally so as to effectuate the purpose of the legislative body enacting it; and so *held* as to the Adjustment Act of 1887. *United States* v. *Southern Pacific Railroad Co.*, 184 U. S. 49.

One is a purchaser in good faith within the sense of § 4 of the Adjustment Act of 1887, if he is in actual ignorance of defects in the railroad company's title and the transaction is an honest one on his part, the ordinary rule respecting constructive notice being inapplicable. *United States* v. *Winona & St. Peter R. R. Co.*, 165 U. S. 463.

147 Iowa, 441, reversed.

THIS case arises out of conflicting claims to 80 acres of land in O'Brien County, Iowa, under the act of March 3, 1887, c. 376, 24 Stat. 556, as amended February 12, 1896, c. 18, 29 Stat. 6, providing for the adjustment of railroad land grants, etc. The land is within the place limits of the grant made May 12, 1864, c. 84, 13 Stat. 72, to the State of Iowa to aid in the construction of a railroad from Sioux City, in that State, to the southern boundary of Minnesota. The grant was *in præsenti* and embraced every alternate section, designated by odd numbers, for ten sections in width on each side of the road, with the usual exceptions and provision for indemnity. The company which was to construct the road and receive the benefit of the grant was to be designated by the State legislature. Upon the presentation of a certificate by the Governor of the State that any section of ten consecutive miles of the road was completed, the Secretary of the Interior was to issue to the State patents for one hundred sections of land "for the benefit of" the company constructing the road, and this was to be repeated as each additional ten miles was constructed until the entire road was completed and all the lands patented. If the road was not completed within ten years from the company's acceptance of the grant,

the lands "granted and not patented" were to revert to the State to enable it to secure the completion of the work; and if the road was not completed within five years after the expiration of the ten years, then the "lands undisposed of" were to revert to the United States. The Sioux City and St. Paul Railroad Company was designated by the State legislature as the beneficiary of the grant in 1866, the company accepted it in the same year, and a map definitely locating the line of the road was filed with the Secretary of the Interior and approved in 1867. As so located, the road was about 80 miles in length. In 1872 the company constructed it from the southern boundary of Minnesota to Le Mars, Iowa, a distance of 56.25 miles, but the remaining part was never constructed, a trackage right to Sioux City over another road being acquired by the company. In 1872 and 1873 the Governor certified that five sections of ten miles each, constituting fifty miles of continuous road from the southern boundary of Minnesota, had been completed and put into operation conformably to the granting act, and the Secretary of the Interior thereupon caused a large amount of lands within the primary and indemnity limits of the grant to be patented to the State "for the use and benefit of" the company, the tract in controversy being among those so patented. Most of the lands patented to the State were soon conveyed by it to the company, but some were not, this tract being among the latter. The company, however, was claiming it in virtue of the grant and the patent to the State. Litigation was had between this company and another, by reason of their overlapping land grants, to determine which was entitled to this tract and others within the overlap, and by the final decree in 1886 this tract was awarded to this company. 117 U. S. 406. In truth, more land was patented to the State for the benefit of the company, and more land was conveyed by the State to the company, than the latter was entitled to

receive for the five ten-mile sections of completed road, not counting the additional 6.25 miles, and in 1882 the State legislature passed an act declaring that the State thereby resumed all lands "which have not been earned" by the company, but the act did not more definitely point out the lands intended to be resumed. Laws Iowa, 1882, c. 107. And in 1884 the State legislature passed an act declaring (§ 1) that all lands resumed and intended to be resumed by the act of 1882 "are hereby relinquished and conveyed to the United States," and also (§ 2): "The governor of the State of Iowa is hereby authorized and directed to certify to the Secretary of the Interior all lands which have heretofore been patented to the State, to aid in the construction of said railroad, and which have not been patented by the State to the Sioux City & St. Paul Railroad Company, and the list of land so certified by the governor shall be presumed to be the lands relinquished and conveyed by section one of this act. *Provided*, that nothing in this section contained shall be construed to apply to lands situated in the counties of Dickinson and O'Brien." Laws Iowa, 1884, c. 71. The tract in controversy, being in O'Brien County, came within the excepting words of the proviso.

This tract was part of an odd-numbered section of land immediately adjoining the third ten-mile section of constructed road, the completion of which was duly certified by the Governor, and was unreserved, unappropriated and vacant at the date of the granting act and at the time the line of road was definitely located. Thus it was not only a part of the lands granted but was earned by actual construction. And, strictly speaking, it was rightly patented to the State for the benefit of the company, the excess in the lands patented being caused by the inclusion in the patents of other lands differently situated and not earned by the completion of the five ten-mile sections of road.

September 11, 1888, while the tract was still free from

any homestead, preëmption or kindred claim and while the patent therefor, issued to the State in 1873 for the benefit of the company, was still outstanding, Ellen M. Childs purchased the tract from the company, paying $88.00 in cash and agreeing to pay ten deferred instalments with interest thereon, making the full price $1,270.64, which was the fair value of the land. At the time of her purchase the tract was in the actual and undisputed possession of the company through a tenant named Fitzgerald, who then became her tenant, and through him she continued in the undisturbed possession until October 8, 1889, when she sold to Logan, the plaintiff in error, who paid her $228.00 in cash and took the land subject to the payment of the ten deferred instalments. Fitzgerald then became the tenant of Logan and remained in possession in that capacity until the spring of 1890, when Davis, the defendant in error, with a gang of men and teams, went upon the land, took possession of it, and began cultivating the larger part of it. In what he did Davis acted without the consent of Logan and with knowledge of Mrs. Childs' purchase from the company in 1888, of her sale to Logan in 1889, and of Fitzgerald's possession as tenant of Mrs. Childs and then of Logan. Although subsequently maintaining the possession obtained in the spring of 1890, Davis did not reside upon the tract or erect any buildings upon it.

In October, 1889, the United States brought a suit—the bill was filed October 4 and the subpœna was served October 8—against the company under the adjustment act of March 3, 1887, *supra*, to regain the title to nearly 22,000 acres of land in Dickinson and O'Brien Counties, including this tract, theretofore patented to the State for the benefit of the company, the theory upon which such relief was sought being that the company had received a larger quantity of other lands than it was entitled to receive under the granting act and therefore

could not properly claim the 22,000 acres. In the Circuit Court the United States prevailed, and this court affirmed the decree. 159 U. S. 349. The ground upon which the decision rested is indicated by the following extract from the opinion (p. 370): "Our conclusion, then, is that the Sioux City company, having failed to complete the entire road, for the construction of which Congress made the grant in question, was not entitled to the whole of the lands granted, but, at most, only to one hundred odd-numbered sections—as those sections were surveyed, whatever their quantity—for each section of ten consecutive miles constructed *and certified by the governor of the State,* and that, according to the measurement of 1887, which is accepted as the basis of calculation, the railroad company had, prior to the institution of this suit, received more lands, on account of the fifty miles of constructed road, certified by the governor, than it was entitled to receive. Under this view, it is unnecessary to inquire whether the particular lands here in dispute should not have been assigned to the company, rather than other lands, containing a like number of acres, that were, in fact, transferred to it, and which cannot now be recovered by the United States, by reason of their having been disposed of by the company. If the company has received as much, in quantity, as should have been awarded to it, a court of equity will not recognize its claim to more in whatever shape the claim is presented."

There was no attempt to make Mrs. Childs, Logan, or the tenant Fitzgerald a party to that suit. During its pendency, and on May 13, 1894, Logan entered into an agreement in writing with the company whereby the latter extended the time for paying the ten deferred instalments until ninety days after a decision should be rendered in the suit by this court, and whereby he agreed that if the decision should be adverse to the company he would ac-

cept from it the amount already paid, with interest, in full satisfaction of all demands against the company on account of the failure of the title.

Shortly following the decision of this court in that suit the lands recovered by the United States, including this tract, were regularly restored to public entry in conformity with the provisions of the adjustment act, and a contest at once ensued in the Land Department over this tract. Logan, claiming to be a purchaser in good faith, applied for a confirmatory patent under § 4, and Davis, claiming to be a *bona fide* occupant, sought to obtain title under the homestead law. A hearing before the local land office, at which the parties presented such evidence as they had in support of their respective claims, resulted in a decision by the local officers in favor of Davis. This was affirmed by the Commissioner of the General Land Office on the theory that the agreement of March 13, 1894, was fatal to Logan's claim as a purchaser; and upon an appeal to the Secretary of the Interior the decisions below were reversed, it being found and held by the Secretary that Logan was a purchaser in good faith within the meaning of § 4 of the adjustment act; that the agreement of March 13, 1894, did not alter his status as a purchaser; and that Davis' possession, acquired after the purchase by Logan and with knowledge of it, did not eliminate the element of good faith from the latter's purchase or otherwise defeat his claim. As a result of this decision, Logan made the requisite payment to the Government (see amendatory act of February 12, 1896, *supra*) and was given a confirmatory patent.

It is conceded that Mrs. Childs and Logan were both citizens of the United States and in that respect within the remedial provisions of § 4 of the adjustment act, and also that in the contest before the Land Department Logan testified that at the time of his purchase from Mrs. Childs in 1889 he had no knowledge of any adverse claim to the

tract. The present record, however, does not purport to contain all the evidence produced in that contest.

When the proceeding in the Land Department was concluded Logan sued Davis in the local state court to recover the possession, and by the pleadings subsequent to the petition the character of the action was so far changed that Davis sought to have Logan declared a trustee of the title for him, Davis, and directed to convey the same to him, and Logan sought to have his title quieted as against Davis, as well as to recover the possession. In Davis' pleading Logan's right under the confirmatory patent was assailed upon the grounds (1) that the grant of 1864 was completely and finally adjusted by the legislation and action of the State in 1882 and 1884, and so was not within the operation of the adjustment act of 1887, (2) that the remedial provisions of § 4 of that act were confined to purchases made prior to the date of the act, and so were not applicable to Mrs. Childs' purchase in 1888 or Logan's purchase in 1889, (3) that Mrs. Childs and Logan were bound to take notice of the various acts and matters bearing upon the company's right to this tract, and so it was legally impossible for either to be a purchaser in good faith within the meaning of § 4, and (4) that the decision of the Secretary of the Interior, reversing the action of the local officers and of the Commissioner of the General Land Office, was given "unlawfully and without any authority of law." The last ground evidently was intended as a mere conclusion from the others, for nothing else was alleged to make it even colorable. The case was heard upon an agreed statement of facts, the substance of which has been recited, and a decree was rendered in favor of Davis, which was affirmed by the Supreme Court of the State. 147 Iowa, 441. That court held that Logan was not a purchaser in good faith within the meaning of § 4 of the adjustment act of 1887, and this upon the theory (a) that he was presumed to have

known the character of the company's title and (b) that § 4 was not applicable to a purchase made after the date of the act. To reverse that decision Logan prosecutes this writ of error.

Mr. William Milchrist, Mr. George C. Scott and *Mr. W. D. Boies* for plaintiff in error:

Defendant cannot maintain counterclaim. Plaintiff is entitled to protection under the act of March 3, 1887. The United States and defendant are estopped.

In support of these contentions, see *Atherton* v. *Fowler*, 96 U. S. 211; *Bausman* v. *Eads*, 48 N. W. Rep. 769; *Branon* v. *Worth*, 17 Wall. 32; *Cahn* v. *Barnes*, 5 Fed. Rep. 399; *Gibbons* v. *United States*, 5 Ct. Cls. 416; *Hosmer* v. *Wallace*, 97 U. S. 575; *In re McKeag*, 99 Am. St. Rep. 80; *Knepper* v. *Sands*, 194 U. S. 476; *Knevels* v. *Railroad Co.*, 62 Fed. Rep. 224; *Logan* v. *Davis*, 147 Iowa, 442; *Lyle* v. *Patterson*, 228 U. S. 211; *McCravy* v. *Remsen*, 54 Am. Dec. 194; *Olson* v. *Traver*, 26 L. D. 350; *Peters* v. *Jones*, 35 Iowa, 512; *Portis* v. *Hill*, 98 Am. Dec. 481; 2 Pomeroy's Eq. (3d ed.), § 813; *Quimby* v. *Conlan*, 104 U. S. 180; *State* v. *Jackson R. R. Co.*, 69 Fed. Rep. 116; *State* v. *Milk*, 11 Fed. Rep. 389; *State* v. *Flint Co.*, 51 N. W. Rep. 103; *Swanson* v. *Sears*, 224 U. S. 180; *United States* v. *Southern Pacific R. R.*, 184 U. S. 49; *United States* v. *Winona R. R. Co.*, 165 U. S. 463.

Mr. Madison B. Davis and *Mr. Edwin J. Stason* for defendant in error:

There is no Federal question involved. Plaintiff in error was not a good faith purchaser. Defendant had a right to make homestead entry. Equitable estoppel is not available to plaintiff in error.

In support of these contentions, see 11 Am. & Eng. Ency. (2d ed.), 434; 21 *Id.*, 588; 26 *Id.* 397, 398; *Ard* v. *Brandon*, 156 U. S. 537; *Atherton* v. *Fowler*, 96 U. S. 513;

LOGAN *v.* DAVIS.

ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

No. 247. Submitted March 9, 1914.—Decided May 11, 1914.

Under § 237, Judicial Code, this court has jurisdiction to review a judgment of a state court denying a claim duly set up under a confirmatory patent issued under § 4 of the Land Grant Adjustment Act of 1887 and holding that the patentee was not entitled to the benefit of the provisions of that section.

The decision of the Secretary of the Interior that the grantee of a railroad company was a purchaser in good faith in the sense of the Adjustment Act of 1887, is conclusive so far as it is based on fact and cannot be disturbed except as it may be grounded upon an error of law, there being no charge of fraud.

The practical interpretation of an ambiguous or uncertain statute by the Executive Department charged with its administration is entitled to the highest respect; and, if acted upon for a number of years, will not be disturbed except for very cogent reasons.

Successive Secretaries of the Interior having uniformly interpreted the remedial sections of the Adjustment Act of 1887 as embracing pur-

Arkansas &c. R. Co. v. *German Nat'l Bank*, 207 U. S. 270; *Bacon* v. *Texas*, 163 U. S. 207; *Bement* v. *National Harrow Co.*, 186 U. S. 70; *Benner* v. *Lane*, 116 Fed. Rep. 407; *California Powder Co.* v. *Davis*, 151 U. S. 389; *Castillo* v. *McConnico*, 168 U. S. 674; *Clements* v. *Warner*, 24 How. 394; *Clark* v. *Lyster*, 155 Fed. Rep. 513; *De Saussure* v. *Gaillard*, 127 U. S. 216; *Delaware City Co.* v. *Reybold*, 142 U. S. 636; *Dower* v. *Richards*, 151 U. S. 658; *Duluth &c. R. Co.* v. *Roy*, 173 U. S. 587; *Elder* v. *Wood*, 208 U. S. 226; *Egan* v. *Hart*, 165 U. S. 188; *Eustis* v. *Bolles*, 150 U. S. 370; *Fowler* v. *Lamson*, 164 U. S. 252; *Giles* v. *Teasley*, 193 U. S. 146; *Gillis* v. *Stinchfield*, 159 U. S. 658; *Gjerstadengen* v. *Van Duzen* (Nor. Dak.), 76 N. W. Rep. 233; *Hamblin* v. *Western Land Co.*, 147 U. S. 531; *Hammond* v. *Johnson*, 142 U. S. 73; *Harrison* v. *Morton*, 171 U. S. 38; *Hedrick* v. *Atchison &c. R. Co.*, 167 U. S. 673; *Hale* v. *Lewis*, 186 U. S. 473; *Johnson* v. *Risk*, 137 U. S. 300; *Knepper* v. *Sands*, 194 U. S. 476; *Leathe* v. *Thomas*, 207 U. S. 93; *Leonard* v. *Vicksburg &c. R. Co.*, 198 U. S. 416; *Logan* v. *Davis*, 147 Iowa, 441; *Lyle* v. *Patterson*, 228 U. S. 211; *Lake Superior Iron Co.* v. *Cunningham*, 155 U. S. 354; *Manley* v. *Tow*, 110 Fed. Rep. 241; *Mo. Pac. Ry. Co.* v. *Fitzgerald*, 160 U. S. 556; *Moran* v. *Horsky*, 178 U. S. 205; *Moss* v. *Donovan*, 176 U. S. 413; *Murdock* v. *Memphis*, 20 Wall. 590; *Nelson* v. *Nor. Pac. R. Co.*, 188 U. S. 108; *Olson* v. *Traver*, 26 L. D. 350; *Ostrom* v. *Wood*, 140 Fed. Rep. 294; *Pierce* v. *Somerset R. Co.*, 171 U. S. 641; *Pittsburg Iron Co.* v. *Cleveland Iron Co.*, 178 U. S. 270; *Rakes* v. *United States*, 212 U. S. 58; *Remington Paper Co.* v. *Watson*, 173 U. S. 443; *Rutland R. Co.* v. *Cent. Ver. R. R. Co.*, 159 U. S. 630; *Seaboard &c. R. Co.* v. *Duvall*, 225 U. S. 477; *Seneca Nation* v. *Christy*, 162 U. S. 263; *S. C. & St. Paul R. Co.* v. *Osceola County*, 43 Iowa, 318; *S. C. & St. Paul R. Co.* v. *United States*, 159 U. S. 349; *Speed* v. *McCarthy*, 181 U. S. 269; *Smith* v. *Hollenbeck*, 231 Illinois, 484; *St. Louis &c. R. Co.* v.

McGee, 115 U. S. 469; *St. Louis &c. R. Co.* v. *Missouri*, 156 U. S. 478; *Walker* v. *Ehresman* (Neb.), 113 N. W. Rep. 218; *Weyerhauser* v. *Minnesota*, 176 U. S. 550; *Wood Machine Co.* v. *Skinner*, 139 U. S. 293; *Waters-Pierce Oil Co.* v. *Texas*, 212 U. S. 112.

MR. JUSTICE VAN DEVANTER, after making the foregoing statement, delivered the opinion of the court.

As Logan claimed as a purchaser in good faith within the meaning of § 4 of the adjustment act of 1887, under which a confirmatory patent had been issued to him, and the Supreme Court of the State denied that claim and held that he was not entitled to the benefit of the provisions of that section, the judgment is so plainly subject to review by this court under § 237 of the Judicial Code that a contention to the contrary, found in one of the briefs, is dismissed as not justifying further comment. *Gauthier* v. *Morrison*, 232 U. S. 452.

And as the Secretary of the Interior found, from the evidence submitted in the contest before the Land Department, that Logan was a purchaser in good faith in the sense of the adjustment act, and no basis was laid in the pleadings or agreed statement of facts for rejecting or disturbing that decision save as it was said to be grounded upon error of law and misconstruction of the statute, it is manifest that unless some of the objections urged against it on that score are well taken, Logan's title should be sustained. *Vance* v. *Burbank*, 101 U. S. 514, 519; *Lee* v. *Johnson*, 116 U. S. 48; *Gertgens* v. *O'Connor*, 191 U. S. 237, 240; *Ross* v. *Day*, 232 U. S. 110, 116

The act of 1887, in its first section, authorized and required the Secretary of the Interior immediately to adjust, in accordance with the decisions of this court, the several land grants made by Congress to aid in the construction of railroads "and heretofore unadjusted." This included

the grant made by the act of 1864, unless already adjusted. That it had not been adjusted by the Land Department is conceded, but it is insisted that it had been adjusted by the legislation and action of the State in 1882 and 1884, and so was not within the operation of the adjustment act of 1887. To this we cannot assent. The United States had not committed the adjustment to the State, and neither had the State assumed to make an adjustment for the United States. Prior to the act of 1887 the administration of the several railroad land grants rested with the Land Department, of which the Secretary of the Interior is the head, *Catholic Bishop of Nesqually* v. *Gibbon*, 158 U. S. 155, 166–7, and some of the lesser grants had progressed to a final adjustment in regular course of administration. It was because of this that the restrictive words "and heretofore unadjusted" were inserted in the act. They meant only that adjustments theretofore effected by the Land Department in regular course were not to be disturbed. The facts before recited amply illustrate that this grant had not proceeded to such an adjustment. The Secretary of the Interior treated it as unadjusted, *Sioux City & St. Paul R. R. Co.*, 6 L. D. 54, 71, and this court impliedly, if not expressly, approved his action. *Sioux City & St. Paul Railroad Co.* v. *United States*, 159 U. S. 349.

The second section of the act of 1887 related to the recovery by the United States of lands which, upon the completion of any adjustment, or sooner, appeared to have been erroneously certified or patented by the Land Department "to or for the use or benefit of any company" claiming under a grant to aid in the construction of a railroad. The third section related to the reinstatement of preëmption and homestead entries found, in the course of any adjustment, to have been erroneously canceled by reason of such a grant or a withdrawal, and directed that where the entryman failed to apply for reinstatement within a

reasonable time, to be fixed by the Secretary of the Interior, the land should be disposed of under the public-land laws to *bona fide* purchasers, if any, and, if there were none, then to *bona fide* settlers. The fourth section read as follows:

"That as to all lands, except those mentioned in the foregoing section, which have been so erroneously certified or patented as aforesaid, and which have been sold by the grantee company to citizens of the United States, or to persons who have declared their intention to become such citizens, the person or persons so purchasing in good faith, his heirs or assigns, shall be entitled to the land so purchased, upon making proof of the fact of such purchase at the proper land office, within such time and under such rules as may be prescribed by the Secretary of the Interior, after the grants respectively shall have been adjusted; and patents of the United States shall issue therefor, and shall relate back to the date of the original certification or patenting, and the Secretary of the Interior, on behalf of the United States, shall demand payment from the company which has so disposed of such lands of an amount equal to the Government price of similar lands; and in case of neglect or refusal of such company to make payment as hereafter specified, within ninety days after the demand shall have been made, the Attorney General shall cause suit or suits to be brought against such company for the said amount: *Provided*, That nothing in this act shall prevent any purchaser of lands erroneously withdrawn, certified, or patented as aforesaid from recovering the purchase-money therefor from the grantee company, less the amount paid to the United States by such company as by this act required: *And provided*, That a mortgage or pledge of said lands by the company shall not be considered as a sale for the purpose of this act, nor shall this act be construed as a declaration of forfeiture of any portion of any land-grant for conditions broken, or as au-

thorizing an entry for the same, or as a waiver of any rights that the United States may have on account of any breach of said conditions."

This section was amended February 12, 1896, c. 18, 29 Stat. 6, by adding to it the following:

"*Provided further*, That where such purchasers, their heirs or assigns, have paid only a portion of the purchase price to the company, which is less than the Government price of similar lands, they shall be required, before the delivery of patent for their lands, to pay to the Government a sum equal to the difference between the portion of the purchase price so paid and the Government price, and in such case the amount demanded from the company shall be the amount paid to it by such purchaser."

Section five related to lands apparently within such a grant and lying opposite the constructed parts of the road, but excepted from the operation of the grant and not certified or patented to or for the benefit of the railroad company, and provided that where any such land was sold by the company to a *bona fide* purchaser, who was a citizen of the United States or had declared his intention to become such, the purchaser, his heirs or assigns, could obtain a patent by paying the ordinary Government price, but that this privilege should not exist if at the time of the sale by the company the land was occupied by an adverse claimant under the preëmption or homestead laws.

Whether § 4 was confined to purchases made prior to the date of the act, or equally included subsequent purchases, where made in good faith, is one of the controverted questions in the case. Both views have support in the terms of the act, and if the question were altogether new there would be room for a reasonable difference of opinion as to what was intended. Certainly, resort to interpretation would be necessary. But the question is not altogether new. It has often arisen in the administration of the act, and successive Secretaries of the Interior uniformly have

held that the remedial sections embraced purchases after the date of the act, no less than prior purchases, if made in good faith. *Sethman* v. *Clise*, 17 L. D. 307; *Holton* v. *Rutledge*, 20 L. D. 227; *Andrus* v. *Balch*, 22 L. D. 238; *Briley* v. *Beach, Id.* 549; *Re Carlton Seaver*, 23 L. D. 108; *Neilsen* v. *Central Pacific Railroad Co.*, 26 L. D. 252. Many thousands of acres have been patented to individuals under that interpretation, and to disturb it now would be productive of serious and harmful results. The situation therefore calls for the application of the settled rule that the practical interpretation of an ambiguous or uncertain statute by the Executive Department charged with its administration is entitled to the highest respect, and, if acted upon for a number of years, will not be disturbed except for very cogent reasons. *United States* v. *Moore*, 95 U. S. 760, 763; *Hastings and Dakota Railroad Co.* v. *Whitney*, 132 U. S. 357, 366; *United States* v. *Alabama Great Southern Railroad Co.*, 142 U. S. 615, 621; *Kindred* v. *Union Pacific Railroad Co.*, 225 U. S. 582, 596.

The remedial sections of the act were also considered by this court in *United States* v. *Southern Pacific Railroad Co.*, 184 U. S. 49, 56, which involved several purchases made after the date of the act, and it was there said: "But the act itself bears upon its face evidence that it was not intended to be limited to cases of purchases from the railroad company prior to its date." And, after referring to the language of §§ 2 and 3, it was added: "This seems to imply an intent that all mistakes of the nature referred to which shall have occurred up to the very completion of the adjustment may be rectified. Section 4 makes provision for the issue of patents to certain purchasers from railroad companies, providing proof shall be made 'within such time and under such rules as may be prescribed by the Secretary of the Interior, after the grants respectively shall have been adjusted.' While other sections may not be so specific, yet placing them

alongside of those from which quotations have been made it is reasonable to hold that the act applies not merely to transactions had before its date, but to any had before the time of final adjustment. In this case the several grants to the Southern Pacific have not yet been finally adjusted. Further, it must be borne in mind that this is a remedial statute, and is to be construed liberally, and so as to effectuate the purpose of Congress and secure the relief which was designed, and the mere date of the transaction between the purchaser and the railroad company is not of itself vital in determining whether there is or is not an equity in behalf of the purchaser."

Counsel for Davis rely upon *Knepper* v. *Sands*, 194 U. S. 476, as placing a different interpretation upon the adjustment act. But, although some broad language is found in the opinion, the real decision did not go as far as suggested. The case came here upon a certificate from a Circuit Court of Appeals, and the question presented for decision, considering the facts stated in the certificate, was, whether a purchase from the railroad company of land erroneously patented for its benefit under the grant of 1864 could be esteemed a purchase in good faith, within the meaning of § 4 of the act of 1887, where at the time of the purchase the land was occupied by a *bona fide* settler who was residing upon, improving and cultivating the same with a view to acquiring it under the homestead law. The question was answered in the negative, particular emphasis being laid upon the settler's occupancy at the time of the purchase and upon the well known policy of favoring actual settlers. The answer must have been the same whether the purchase was before or after the date of the act, and manifestly there was no purpose to overrule or qualify the decision in *United States* v. *Southern Pacific Railroad Co.*, *supra*, for it was not even mentioned. So, reading the opinion in *Knepper* v. *Sands* with appropriate regard for the facts of the case, we think it is not in point

or controlling here, for no one was occupying or claiming this tract under the settlement laws at the time it was purchased from the company.

The contention that Logan was charged with constructive notice of the defect in the company's title and so was not a purchaser in good faith, in the sense of the adjustment act, must be overruled, as was a like contention in *United States* v. *Winona & St. Peter Railroad Co.*, 165 U. S. 463. It was there said, referring to the remedial provisions of § 4 (p. 480): "It will be observed that this protection is not granted to simply *bona fide* purchasers (using that term in the technical sense), but to those who have one of the elements declared to be essential to a *bona fide* purchaser, to wit, good faith. It matters not what constructive notice may be chargeable to such a purchaser if, in actual ignorance of any defect in the railroad company's title and in reliance upon the action of the Government in the apparent transfer of title by certification or patent, he has made an honest purchase of the lands. The plain intent of this section is to secure him the lands, and to reinforce his defective title by a direct patent from the United States, and to leave to the Government a simple claim for money against the railroad company." And, referring to the provisions of § 5, it was further said (p. 481): "It is true the term used here is '*bona fide* purchaser,' but it is a *bona fide* purchaser from the company, and the description given of the lands, as not conveyed and 'for any reason excepted from the operation of the grant,' indicates that the fact of notice of defect of title was not to be considered fatal to the right. Congress attempted to protect an honest transaction between a purchaser and a railroad company, even in the absence of a certification or patent." This view of the purpose and meaning of the act was repeated and applied in *Gertgens* v. *O'Connor*, 191 U. S. 237, and *United States* v. *Chicago, Milwaukee & St. Paul Railway Co.*, 195 U. S. 524

As it thus appears that the decision of the Secretary of the Interior was right in point of law, and as it was conclusive upon all questions of fact (*Gertgens* v. *O'Connor*, *supra*), it follows that the state court erred in not sustaining Logan's title obtained under that decision.

Decree reversed.

SMITH *v.* STATE OF TEXAS